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Supreme Court, U.S.
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SEP 16 1958
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 371

NATIONAL BROADCASTING COMPANY, INC.,
Petitioner,

PHILCO CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 16, 1958

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Broadcasting Company, Inc. ("NBC") prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review a judgment of that court reversing an order of the Federal Communications Commission ("Commission").

The Commission's order dismissed a protest by respondent Philco Corporation ("Philco") to the renewal of NBC's licenses to operate its television and radio stations in Philadelphia.

Opinions Below

The majority and dissenting opinions of the Court of Appeals (Appendix A, *infra*, R. 95-103)[1] and the opinion

[1] Pages of the record certified from the court below are herein referred to by "R."; appendices to this petition are referred to herein as "App.".

and order of the Commission (Appendix B, *infra*, R. 74-91) have not yet been reported except at 17 Pike & Fischer R. R. 2054 and 15 Pike & Fischer R. R. 965 respectively.

Jurisdiction

The judgment of the Court of Appeals is dated and was entered on June 19, 1958 (App. A, p. 9a, R. 104). Transmission to the Commission of the court's opinion and a certified copy of its judgment has been stayed by order of the Court of Appeals until September 17, 1958.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. §1254(1), and under the Act of June 7, 1934, c. 426, 48 Stat. 926, as amended, 47 U. S. C. §402(j).

Questions Presented

May a person who is not engaged in broadcasting, and who does not compete with any broadcasting service, protest and appeal the Commission's renewal of a broadcast license?

Must the Commission and the courts entertain protests and appeals by persons whose only claim to standing is that a Commission order may or will injure them economically in a business not related to broadcasting?

Did the majority of the Court of Appeals commit reversible error in extending this Court's prior decisions by holding that respondent is entitled to protest and appeal the Commission's renewal of petitioner's broadcast licenses, where respondent did not claim to be injured by such renewals except as a manufacturer and as an advertiser, and where the Commission found that respondent's alleged injury was speculative, remote and insubstantial?

Statutes Involved

The principal statutes involved are the protest and appeals sections of the Communications Act,[2] 47 U. S. C. §§309(c) and 402(b), relevant portions of which are printed at Appendix C, *infra*.

Statement of the Case

NBC is engaged in the business of operating national television and radio networks. In addition, pursuant to Commission authorization, NBC owns a limited number of television and radio stations (R. 7). The stations here involved, WRCV and WRCV-TV in Philadelphia, were purchased by NBC in 1956 after the Commission had approved the purchase as in the public interest under Section 310(b) of the Act, 47 U. S. C. §310(b). *National Broadcasting Co., Inc.*, 13 Pike & Fischer R. R. 374 (1955). No protest was filed in that proceeding.

In May of 1957, NBC applied for renewal of these Philadelphia station licenses for the regular three-year term. The Commission granted the applications on July 18, 1957 (R. 5), after finding that the public interest, convenience and necessity would thereby be served, as provided in Section 309(a) of the Act, 47 U. S. C. §309(a).

On August 14, 1957, respondent filed a protest to these renewal authorizations (R. 5-27), purporting to do so under Section 309(c) of the Act, 47 U. S. C. §309(c). That section requires a protestant to specify facts showing that he is a "party in interest" to the grant he seeks to challenge, and to state with particularity the matters on which

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[2] The Communications Act of 1934, c. 652, 48 Stat. 1064, as amended, 47 U. S. C. §§151 *et seq.*, fully cited in Table of Statutes, hereafter called the "Act".

he relies to support his contention that the grant was not in the public interest.

Respondent's claim to be a party in interest was not and is not based on any actual or competitive interest in broadcasting. Respondent had no such interest at the time its protest was filed, nor does it now. It does not own any broadcast station, does not have any application pending for a station license, and does not compete with any broadcast licensee (R. 34).

Instead, Philco is a manufacturer of various products which it sells in competition with others, including NBC's parent company, Radio Corporation of America ("RCA"). It claims standing to protest primarily on the ground that the Commission's renewal grants to NBC allegedly injure Philco "as a manufacturer competing with RCA in the sale of its products". Philco alleges that these products include air conditioners, home laundry equipment, radio and television receivers, ranges and refrigerators (R. 6).

In support of this contention the protest states that NBC's stations describe themselves as "a service of RCA" during station identification and also favorably mention RCA at other times.[3] The protest argues that these prac-

[3] Such references are a normal practice in the broadcasting industry. Examples are readily available: WTOP-TV identifies itself as "The TV station of the Washington Post, Washington's favorite home newspaper"; the stations owned by the General Electric Co., which manufactures and sells electronic products in competition with Philco and RCA, identify themselves as "General Electric" stations and use the General Electric trade-mark; the name "Columbia", used on phonographs and phonograph records produced by Columbia Broadcasting System, Inc., is regularly heard on stations owned by that company (R. 40); prior to 1953, a Philco subsidiary owned this same Philadelphia television station, and Philco itself followed a similar practice (R. 40, 94). Presumably, therefore, Philco would not see fit to complain in this respect if NBC were named the "RCA Broadcasting Company".

tices afford RCA "preferential publicity which is not available to Philco or other manufacturers who compete with RCA" (R. 9). However, the protest does not claim that such allegedly preferential publicity for RCA was in any respect derogatory of Philco or its products, or caused Philco lost sales or other specific injury, or that NBC refused to carry any advertising which Philco might wish to place on any NBC station or facility, or that Philco has been discriminated against in any respect in obtaining access to any advertising outlet.

In fact Philco has had, and if it so chose could now have, the very type of publicity of which it complains. A Philco subsidiary at one time owned the television station here involved (then known as WPTZ) but sold it to Westinghouse Broadcasting Company ("Westinghouse") in 1953 (App. B, pp. 2b-3b; R. 76). Westinghouse is a subsidiary of Westinghouse Electric Corporation, a competitor of both Philco and RCA, and owns a number of television and radio stations which identify themselves as "Westinghouse" stations. During the period when Philco owned WPTZ, it was regularly identified on the air as "your Philco station"; WPTZ also referred to Westinghouse as part of its station identification in exchange for reciprocal references to Philco on Westinghouse's radio station in Philadelphia (R. 40, 94). While respondent chose in 1953 to discontinue this arrangement and sell its television station to its competitor for the record price of $8,500,000 (R. 32), it has always been free to purchase another "Philco station".

The protest secondarily asserts that Philco is a party in interest to the renewals "as an advertiser" affected by NBC's television network operations (R. 10). The specific operations here attacked have been and still are accepted industry practices, the so-called "option time" and "must

buy" arrangements of NBC and other networks[4], which allegedly render sponsorship of network television programs "prohibitively expensive" (R. 10). It is worthy of note, however, that many of Philco's competitors have found the sponsorship of network programs on NBC and other networks to be well worth the price. Since these network practices do not result from NBC's ownership of the Philadelphia stations, the Commission found no merit in Philco's contention that, as an advertiser, it would be injured by the renewal grants (App. B, p. 13b, R. 86). The Court of Appeals did not review this finding (App. A, p. 3a, R. 97).

On the basis of this alleged standing, coupled with a broadside recital of various unproven and stale charges ranging over the entire history of RCA and NBC (R. 21-26), the protest demands that the Commission order a hearing on a multitude of "issues" (App. B, p. 8b, R. 26-27), the hearing of which could well take several years.[5]

The Commission dismissed the protest on the ground that Philco lacked standing to bring it. The Commission then proceeded to consider whether any of the matters alleged in Philco's protest would merit a hearing on the

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[4] These arrangements are permissible under the Commission's Rules, although the Commission has been currently considering recommendations that it restrict them (Commission Docket No. 12285). Philco could have appeared in that proceeding, but chose not to do so.

[5] Among other things, the protest seeks to incorporate by reference the issues raised in litigations pending against RCA and NBC (App. B, p. 6b, R. 11-17). One of these pending litigations is a treble damage antitrust action by Philco against RCA and others in the United States District Court for the Eastern District of Pennsylvania (Civil Action No. 21,923) in which Philco seeks $150,000,000 in damages (R. 29). That action was commenced on January 17, 1957, seven months prior to the filing of Philco's protest, and includes charges against RCA paralleling many of the allegations sought to be bootstrapped into this proceeding.

Commission's own motion, but found no basis in the protest for such a hearing (App. B, pp. 16b-17b, R. 89-90).

Respondent appealed to the court below, purporting to do so under Section 402(b)(6) of the Act, 47 U. S. C. §402(b)(6), and NBC intervened. The Court of Appeals, Judge Madden dissenting, held that Philco has standing to protest and appeal the Commission's renewal grants, and remanded the case to the Commission for further proceedings consistent with the court's opinion.

Reasons for Granting the Writ

(1) This Case Presents An Important Public Question Concerning The Qualifications Required For Standing To Challenge Commission Grants Which Should Be Authoritatively Settled By This Court.

The majority of the Court of Appeals found the question here presented a novel and difficult one and resolved this difficulty by extending the right to contest Commission action beyond all previous limits (App. A, pp. 4a-5a, R. 98-99).[6] The minority refused to enter this "new field" (App. A, p. 8a, R. 102), pointing out:

> "* * * the decision of the Court * * * represents an act of generosity with regard to the time and energy of the Federal Communications Commission (FCC), which is completely unjustified. I think that there is not even a possibility that the further proceedings which this decision imposes upon the FCC will result in anything useful." (App. A, p. 6a, R. 100)

[6] The difficulty which the majority of the court had persisted even after the opinion was delivered. This is evident from the fact that the majority opinion as originally rendered was changed so as to state that only a so-called "preferential" (as distinguished from "an") "economic advantage" obtained through use of the licensed facilities would give standing to a non-broadcasting competitor of the licensee's parent (App. A, p. 6a, R. 100).

If the majority decision is allowed to stand, it will permit persons having no direct or competitive interest in the broadcasting industry to protest and appeal Commission determinations with which they have no legitimate concern. The result would be an unprecedented additional burden on the Commission and the appellate courts, to the detriment of the work of both and of the public at large, and an open invitation to the litigious to disrupt the industry by wholesale protests against Commission authorizations.

The Act does not expressly define who is a "party in interest" entitled to the extraordinary status of protestant, and who qualifies as a "person aggrieved" having the right to appeal.[7] When Congress enacted the protest section in 1952, it recognized the danger of giving "party in interest" too broad a construction, but was of the view that the term had already been adequately defined by judicial decision. The Senate Report on the protest bill stated:

> "Fear has been expressed that use of 'parties in interest' might make possible intervention into proceedings by a host of parties who have no legitimate interest but solely with the purpose of delaying license grants which properly should be made. The Committee does not so construe the term 'party in interest'; 'parties in interest' because of electrical interference are fixed and defined by the Supreme Court decision in the KOA case (319 U. S. 239) and the Commission's rules and regulations; 'parties in interest' from an economic standpoint are defined by the Supreme Court decision in the

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[7] A "party in interest" entitled to protest qualifies as a "person who is aggrieved or whose interests are adversely affected" by a Commission order denying his protest, and may appeal such an order under 47 U. S. C. §402(b)(6). *Metropolitan Television Co.* v. *United States*, 221 F. 2d 879, 880 (D. C. Cir. 1955).

Sanders case (309 U. S. 470)." S. Rep. No. 44, 82d Cong., 1st Sess., p. 8 (1951).

The two cases referred to in the Senate Report, *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, and *Federal Communications Commission* v. *National Broadcasting Co., Inc.* (*KOA*), 319 U. S. 239, held that radio station owners had standing to appeal Commission orders which had a direct and substantial adverse effect on their station operations. In *Sanders*, the owner of a station which was already in financial difficulty was held entitled to appeal the grant of a construction permit for a new station to serve the same community in competition with the appellant. In *KOA*, an existing station was held to have standing to appeal a Commission order authorizing substantial electrical interference with the appellant's signal.

Even in the *KOA* case, however, both this Court and the Court of Appeals divided sharply on the question whether the appellant had a sufficient interest in the Commission's action to be a "person aggrieved" within the meaning of the Act. Judge (later Mr. Justice) Rutledge wrote in the court below:

> "It seems not unreasonable to read the [*Sanders*] opinion as requiring by implication that there be probable injury of a substantial character. So much by way of limitation seems necessary to prevent vindication of the public interest from turning into mass appeals by the industry at large, with resulting hopeless clogging of the administrative process by judicial review." *National Broadcasting Co., Inc.* v. *Federal Communications Commission*, 132 F. 2d 545, 548 (D. C. Cir. 1942).

This Court affirmed the Court of Appeals (at 319 U. S. 239) with three justices abstaining and Justices Frankfurter and Douglas dissenting.[8]

In the present case the protest was filed by one who is not even a member of the "industry at large", and whose alleged injury moreover is both speculative and remote from the Commission's action. Respondent has no interest in the broadcasting business, nor does it claim to have any better standing to challenge the Commission's grants to NBC than any other competitor of RCA, or any other national advertiser. Philco contends, in effect, that the number of persons who could protest and appeal these and other grants to NBC is virtually unlimited.[9]

But the significance of the majority's holding here goes far beyond its obvious effect on this and future applications to the Commission by NBC. A substantial portion of the Commission's present licensees[10] are also engaged in busi-

[8] In his dissent, Mr. Justice Douglas stated:

> "* * * if we accept as constitutionally valid a system of judicial review invoked by a private person who has no individual substantive right to protect but who has standing only as a representative of the public interest, then I think we must be exceedingly scrupulous to see to it that his interest in the matter is substantial and immediate. Otherwise we will not only permit the administrative process to be clogged by judicial review; we will most assuredly run afoul of the constitutional requirement of case or controversy." 319 U. S. at p. 265.

See also the dissenting opinion in *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4, 20-21.

[9] In both 1956 and 1957, about 10,000 companies used one or more of three national advertising media (consumer magazines, network television and Sunday newspaper supplements). "National Advertiser Investments, 1956" and "National Advertiser Investments, 1957", published by Leading National Advertisers, Inc. In addition, there are thousands of organizations competing in the various fields in which RCA and its subsidiaries compete. R. 37.

[10] Including such multiple owners as Westinghouse, American Broadcasting-Paramount Theatres, Inc., Columbia Broadcasting System, Inc., and Crosley Broadcasting Corporation.

nesses other than broadcasting, or are under common ownership with companies engaged in other businesses. The decision below exposes these licensees to similar protests and appeals by non-broadcasters, and thus compounds its effect on the Commission and the appellate courts.

While the specific problem thus presented has not come before this Court until now, this Court's previous decisions follow a line of reasoning which was ignored in the instant decision by the majority of the Court of Appeals. The decision below clearly poses the prospect of "hopeless clogging of the administrative process by judicial review", viewed with justifiable alarm in the *KOA* case, even though that case concerned one who was both in the broadcasting industry and who was directly and substantially injured by the Commission's action. See also, *Federal Communications Commission* v. *WJR*, 337 U. S. 265, fn. 14 at p. 280, stating that the *KOA* case should not be read as giving station owners standing in all interference cases.

Clarification by this Court of the meaning of "party in interest" and "person aggrieved" as used in the protest and appeals sections of the Act is therefore urgently required in the interest of the Commission, the courts, the industry and the public which the industry serves.

(2) The Decision Below Conflicts With Principles Established By Decisions Of Various Circuit Courts, Including Decisions By The Court Below.

In dismissing respondent's protest, the Commission relied on this Court's decisions in the *Sanders* and *KOA* cases, and on Court of Appeals' decisions in the District of Columbia Circuit and in the Second Circuit (App. B, p. 11b, R. 84). The Commission has consistently interpreted these and other cases as establishing the principle

that one who would qualify as a protestant must prove that he is likely to suffer substantial competitive injury as a direct and immediate result of the authorization he seeks to challenge (App. B, pp. 11b-12b, R. 84-85).

Testing this protest against that rule, the Commission held it insufficient to give Philco status under the statute. To the extent that Philco rested its claim on NBC's network practices, the Commission found that:

> "Since renewal or lack of renewal of WRCV-TV could not affect Philco with respect to this category of action, they do not, even if we assume *arguendo* that they in fact injure Philco, make it aggrieved by the protested grant." (App. B, p. 13b, R. 86)

With respect to respondent's remaining allegation of injury, that NBC's continued operation of the television station here involved aids RCA in competing with Philco, the Commission held:

> "We think it clear that any real impact on Philco's competitive position of such activities is so speculative and so indirect that it would make a mockery of the concept of 'party in interest' to apply it to these facts," (App. B, p. 13b, R. 86-87)

The injury Philco asserts, if it exists at all, does not result from the Commission's action here in any realistic sense. Philco's alleged injury is so remote from the protested grant that it does not even occur in the broadcasting industry or in a business competitive with broadcasting,[11]

[11] Until the instant case, the furthest extension of the right to protest Commission action was *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 225 F. 2d 511, 514 fn. 8 (D. C. Cir. 1955). There, a newspaper company which claimed injury as a result of a Commission grant (of a license for a television station which would compete in the same area with the newspaper for advertising revenues) was held entitled to protest that grant. While

and so speculative that there is no specification of probable damage to support it. Yet the majority of the Court of Appeals reversed the Commission and held that Philco had established a sufficiently substantial injury, resulting sufficiently directly and immediately from the Commission's renewal grant, to give Philco the status of a protestant and appellant. If this be true, the flood gates are open and virtually anyone who chooses to file a protest may be held to have enough of an interest in a grant to protest it.

While the majority of the Court of Appeals did refer to the principle that one who seeks to challenge Commission action must show substantial, direct and immediate injury resulting from the grant (App. A, p. 5a, R. 99), the majority's holding is nothing short of a nullification of that principle. Recognizing the dangers inherent in this decision, the majority attempted to limit its effect. The opinion purports to give standing only in the specific situation where a manufacturer protests the renewal of a license for a broadcast station wholly owned or controlled by a competitor, and where the station is being used to give the manufacturer's competitor a so-called "preferential" (but not otherwise defined) economic advantage. The majority then purports to "leave other situations for other cases" (App. A, pp. 5a-6a, R. 100).

These attempts to patch up the rule that the holding itself violates are inconsistent with the rest of the opinion and ineffective. The majority opinion itself elsewhere recognizes (App. A, p. 5a, R. 99), that it is the *likelihood*

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the soundness of that extension of the right to protest is doubtful, the *Clarksburg* decision is not authority for the instant holding in any event. That case at most held that the relevant "industry" included a newspaper competing with a broadcast station for advertising revenues.

of substantial injury that gives standing to protest, rather than the sustaining of actual injury. Accordingly, there can be no logical reason for allowing a protest to a renewal grant but not to an original grant where the same injury is threatened. Nor can the majority's insertion of the word "preferential" into the original opinion distinguish this case from other cases in which a station is owned by one engaged in some other business. As we have already seen, identification of the station owner is a normal industry practice. Whatever advantage is thus obtained by the owner is always "preferential" in the sense in which that word is used in the majority's opinion (*i.e.*, in the sense that no one except the owner can be truthfully identified as the owner of the station).

Moreover, the majority did not even attempt to limit the application of the basic fallacy contained in their ruling—the fallacy that the status of a would-be protestant and appellant turns on the activities of the licensee rather than on whether the protestant is injured by the action of the Commission. That premise of the majority's holding is completely at odds with the clear language of the Act that a "person aggrieved" is one whose interests are "adversely affected *by any order of the Commission*" described therein. 47 U. S. C. §402(b) (6), App. C, p. 3c. A licensee's conduct may, of course, afford grounds for a complaint to the Commission or the courts, and may also be relevant on the merits in determining whether a protested grant was in the public interest. However, standing to attack Commission action can be based only on the effects of that action. See *KFAB Broadcasting Co.* v. *Federal Communications Commission*, 177 F. 2d 40 (D. C. Cir. 1949), where the court below dismissed an appeal by an applicant for a station license, stating:

"If appellant was aggrieved, it was by a subsequent event and not by the order of the Commission." (p. 42)

The actual breadth of the majority's holding here is well illustrated by the "department store" analogy on which the majority opinion relies (App. A, p. 5a, R. 99). That analogy clearly implies that the majority would permit the grant of a station license to a department store in a large metropolitan area to be protested by any retail store in the vicinity. In that event, it is difficult to conceive what limits, if any, will keep future protests within manageable bounds.

There is a clear conflict in principle between the decision below and prior decisions by the same court in which even broadcast licensees[12] and applicants for broadcast licenses[13] have been held to lack standing to challenge Commission action even though they had far more substantial and immediate interests than Phileo has here. The instant decision is irreconcilable with these holdings in the broadcasting field.

Moreover, the reasoning of the majority below is also in conflict with the rationale of decisions in the Second and Seventh Circuits in cases involving other industries.

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[12] *Pittsburgh Radio Supply House* v. *Federal Communications Commission*, 98 F. 2d 303 (D. C. Cir. 1938). See also, *WOKO, Inc.* v. *Federal Communications Commission*, 109 F. 2d 665 (D. C. Cir. 1939); however, in apparent reliance on this Court's decision in the *Sanders* case, the *WOKO* case seems to have been implicitly overruled by later cases in the same court such as *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 225 F. 2d 511, 514 fn. 8 (D. C. Cir. 1955), discussed above.

[13] *Mansfield Journal Co.* v. *Federal Communications Commission*, 173 F. 2d 646, 647 (D. C. Cir. 1949); *KFAB Broadcasting Co.* v. *Federal Communications Commission*, 177 F. 2d 40, 42 (D. C. Cir. 1949); *Southwestern Publishing Co.* v. *Federal Communications Commission*, 243 F. 2d 829, 833 (D. C. Cir. 1957); see also, *St. Louis Amusement Company* v. *Federal Communications Commission*, . F. 2d (D. C. Cir. August 28, 1958).

In *United States Cane Sugar Refiners' Ass'n* v. *McNutt*, 138 F. 2d 116 (2d Cir. 1943), the court found it had no jurisdiction to entertain an appeal by sugar suppliers from an order of the Federal Security Administrator which permitted other competitive sweeteners to be used in fruit canning without being named on the can label, as had previously been required. The Second Circuit held that appellants were not "adversely affected" by the order merely because it released their competitors from a previous restriction. It stated in part:

> "In order to prevent * * * obstruction to the orderly administration of the statute by virtually unlimited petitions to review, it is necessary that the class of petitioners who have 'standing to sue' be confined to those who can show some direct adverse affect traceable with reasonable certainty to the regulations promulgated." (p. 120)

In reaching the above decision, the court relied on its previous analysis of the "person aggrieved" concept in *Associated Industries* v. *Ickes*, 134 F. 2d 694 (2d Cir. 1943), *cert. granted*, 319 U. S. 739, *vacated as moot*, 320 U. S. 707, where it had arrived at a contrary conclusion. There, the Second Circuit held that an association of coal consumers had standing to challenge an order fixing minimum prices for bituminous coal because the consumers were directly and substantially aggrieved thereby.

It should be noted that decisions such as *Associated Industries*, involving consumers' challenges to price-fixing orders, have no real application here as Judge Madden pointed out in his dissent (App. A, pp. 7a-8a, R. 102). Congress has clearly not given the Federal Communications Commission any price-fixing authority in the broadcasting field, but has on the contrary left rates in this field to be determined by the forces of free competition. In

addition, in the cases arising in other industries, the order challenged did in fact threaten direct and immediate injury to the consumers held to have standing to challenge it.

Further, it is evident that even consumers in industries subject to price regulation have no standing to challenge any and all agency action. The agency action must directly and immediately affect them in their capacity as consumers. *Murphy* v. *United States*, 252 F. 2d 389 (7th Cir. 1958), dismissed an appeal by a group of telephone subscribers who sought to challenge a Commission order approving the purchase of one telephone company by another. The subscribers contended that the acquisition was made at an excessive price and violated the antitrust laws. The Seventh Circuit held that the subscribers had no standing to raise these issues, stating:

> "To hold that every Tom, Dick and Harry can attack the Commission's order would be to render meaningless Section 402(a) of Title 47 which limits the right of review to a 'person who is aggrieved or whose interests are adversely affected.'" (p. 394)

As Judge Madden indicated below (App. A, pp. 7a-8a, R. 101-2), in all of the cases relied on by the majority the alleged injury was directly related to the subject which was regulated by the public tribunal.

In no prior case involving standing to attack an action of an administrative agency was such standing upheld as to a person who was not a part of the regulated industry or in direct competition with it, and whose alleged injury did not result from the particular agency action in question, and whose alleged injury was in any event both remote and speculative. That is exactly what the majority below has undertaken to sanction in this case.

The importance of the jurisdictional principle here involved makes it imperative that the above conflicts be

resolved now. The inevitable consequences of the decision of the majority below will otherwise burden the Commission and applicants to it with a mass of protests and appeals directed at blocking Commission action. The resulting injury to the administrative processes in the Commission alone, to say nothing of other agencies, would clearly be contrary to the public interest. Moreover, the confusion and delay which would result in the broadcasting industry and the additional load of mass appeals on already congested court calendars would, in Judge Madden's words, be "completely unjustified".

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted as prayed.

Respectfully submitted,

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September 16, 1958.

APPENDIX A

Opinion and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14166

PHILCO CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

NATIONAL BROADCASTING COMPANY, INC.,

Intervenor.

Appeal from an Order of the
Federal Communications Commission

Decided June 19, 1958

Mr. Henry B. Weaver, Jr., with whom *Messrs. Thomas M. Cooley, II*, and *Quinn O'Connell* were on the brief, for appellant.

Mr. Joel Rosenbloom, Counsel, Federal Communications Commission, with whom *Messrs. Warren E. Baker*, General Counsel, Federal Communications Commission, and *Richard A. Solomon*, Assistant General Counsel, Federal Communications Commission, were on the brief, for appellee.

Mr. John F. Sonnett, with whom *Mr. James E. Greeley* was on the brief, for intervenor.

Before FAHY and WASHINGTON, *Circuit Judges*, and MADDEN, *Judge*, United States Court of Claims.*

FAHY, *Circuit Judge:* This is an appeal by the Philco Corporation from dismissal by the Federal Communications Commission of Philco's protest of the grant without a hearing of the applications of the National Broadcasting Corporation, intervenor in this court,[1] for renewal of the licenses of its television broadcast station WRCV-TV, of certain functions auxiliary to that station, and of its radio broadcast station WRCV, all in Philadelphia. The Commission dismissed the protest on the ground that Philco lacked standing as a "party in interest" within the meaning of section 309(c) of the Federal Communications Act.[2]

Philco is not in the industry of broadcasting by either television or radio. It is a manufacturer of radio and electronic equipment. In this business it is in competition with Radio Corporation of America,[3] the sole stockholder of NBC. Philco in its protest alleged that RCA had been receiving advertising advantages from NBC over the stations above referred to, that NBC's ownership and operation of television stations are basic prerequisites to its mode of operation as a network, and that its "option time" and "must buy" practices as a network injure Philco in its capacity as an advertiser seeking to use the television medium. Philco sought a hearing on public interest issues involving trade practices of RCA and NBC that allegedly violated antitrust laws and in other ways reflected on the character qualifications of NBC as a licensee. Its protest also claimed, *inter alia*, that the renewals would result

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* Sitting by designation pursuant to the provisions of Sec. 291(a), Title 28, U. S. CODE.

[1] Referred to as NBC.

[2] 48 Stat. 1085 (1934), as amended, 47 U. S. C. § 309(c) (Supp. V, 1958).

[3] Referred to as RCA.

in undue concentration of control of the media of mass communication in the greater Philadelphia area.

We are not now concerned with these allegations of Philco as to why in the public interest the license renewals should not be granted, or with the merits of other controversies between Philco on the one hand and NBC and RCA on the other. Our question is only whether Philco has standing by filing a protest to advance reasons which might influence the Commission in making a decision in the public interest with respect to the renewals. Indeed, assuming such standing we are not now concerned even with the sufficiency of Philco's protest to warrant a hearing, a question not yet passed upon by the Commission.

By the "option time" and "must buy" devices Philco alleges that NBC had rendered the sponsorship of network programs in preferred listening periods "prohibitively expensive" and had foreclosed the use of those periods to Philco on any non-network basis other than spot advertising, thus depriving it of a choice as to the markets in which it might wish to concentrate sponsored-program television advertising, using NBC affiliates, even if it could meet NBC's charges, which it characterizes as "exorbitant."

We need not reach the question whether NBC's "option time" and "must buy" requirements are closely enough related to the renewals in question to give Philco standing to protest. For there is another basis for standing which seems to us sufficient. NBC as we have said is a wholly owned subsidiary of RCA. RCA, in the words of Philco's protest, is "in direct competition" with Philco "as a manufacturer" and the operation of the Philadelphia stations by NBC strengthens RCA's competitive position to such a degree as to cause a direct economic effect on Philco. Philco alleges that the Philadelphia stations have been aiding RCA in its competition with Philco by broadcasting certain programming which features RCA and grants it advertising preferences not available to Philco and other competitors of RCA. The Commission in its decision states the matter as follows:

The protestant claims that such "preferential publicity" is exemplified by (1) NBC owned stations inserting the phrase "a service of RCA" during station identification breaks; (2) "news" stories broadcast by NBC stations relate to RCA activities "which other news agencies do not find justified by their news value"; (3) broadcasts of NBC color television programs "again and again" advise the public that RCA is "the pioneer and developer of compatible color"; (4) the "Today" program, a NBC Network presentation, emphasizes its origination, when that is a fact, in "RCA Exhibition Hall" where RCA products are allegedly on display; and (5) NBC stations incorporate "RCA" and "RC" into their call letters, thereby giving RCA an "amount and type of advertising which Philco (and other competing manufacturers) cannot hope to obtain by however a large expenditure."

We need not decide whether the competitive situation between Philco and RCA would have given Philco standing to protest the original grants of the licenses to NBC. The present applications are for renewals and come before the Commission after NBC, it is alleged, has been actually using the facilities injuriously to Philco in the manner described by the Commission. We think the actual use of the facilities in this manner by NBC has created a situation which gives rise to standing in Philco to file its protest and, if the protest is found legally sufficient, to advance the alleged antitrust and other practices for consideration by the Commission in passing upon the renewal applications.

Likelihood of economic injury, held in *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, to give standing under section 402(b)[4] as a "person aggrieved or whose interests are adversely affected" has not before arisen in the present context. Drawing the "party in interest"[5]

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[4] 48 Stat. 926 (1934), as amended, 47 U. S. C. § 402 (b) (1952).

[5] "A 'party in interest' is one who is 'aggrieved or whose interests are adversely affected'. § 402(b). *Camden Radio, Inc.* v. *Federal Communications Commission*, 94 U. S. App. D. C. 312, 220 F. 2d 191." *Metropolitan Television Co.* v. *United States*, 95 U. S. App. D. C. 326, 327, 221 F. 2d 879, 880.

line is a difficult process. Commission and courts are called upon to exercise a judgment upon the facts of cases as they arise. On the one hand sufficient breadth must be given to "party in interest" to permit those seriously affected to participate in the administrative and judicial proceedings, without on the other hand placing the proceedings beyond control of the public tribunals. See *National Broadcasting Co.* v. *FCC*, 76 U. S. App. D. C. 238, 241, 132 F. 2d 545, 548, *aff'd* 319 U. S. 239. Here the likelihood of substantial injury to Philco due to the competitive advertising advantages secured by RCA seems to us about as real as the circumstances held to give standing in *National Coal Ass'n* v. *FPC*, 89 U. S. App. D. C. 135, 191 F. 2d 462, and in *Reade* v. *Ewing*, 205 F. 2d 630 (2d Cir.), and to bring this case within the principles of *Associated Industries* v. *Ickes*, 134 F. 2d 694 (2d Cir.);[6] *National Broadcasting Co.* v. *FCC*, *supra*, and *United States Cane Sugar Refiners' Ass'n* v. *McNutt*, 138 F. 2d 116 (2d Cir.). See, also, *City of Pittsburgh* v. *FPC*, 99 U. S. App. D. C. 113, 237 F. 2d 741.

We should suppose, to illustrate by an analogy, that if a department store operated television and radio stations so as to obtain substantial preferential advertising advantages over a like store in the community, this competitor would be a party in interest who could protest renewal of the licenses and bring public considerations to bear upon renewal applications. In a very real sense the competitor would be aggrieved or adversely affected. See note 5, *supra*. Of course the public considerations advanced by such a party, as distinct from the reasons which gave rise to standing, must stand on their own feet under the criteria which govern the Commission in passing upon the merits of the applications.

Our decision gives standing to a competitor in the position of Philco only to protest a renewal after it is known that licensed facilities are being used by the competing station

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[6] In *Associated Industries* standing was opened to every consumer of coal.

facturer directly to obtain a preferential [*] economic advantage over the protestant. Furthermore, even in those circumstances the standing here is to protest only with respect to renewal of a license of a station wholly owned or controlled by the competitor, which would not often be the case. We leave other situations for other cases.

As already indicated, we do not pass upon the sufficiency of the protest, which must first be considered by the Commission.

Reversed and remanded.

MADDEN, *Judge*, dissenting: I cannot agree with the decision of the Court. I think it represents an act of generosity with regard to the time and energy of the Federal Communications Commission (FCC), which is completely unjustified. I think that there is not even a possibility that the further proceedings which this decision imposes upon the FCC will result in anything useful.

The basis for standing for Philco, which the Court holds to be adequate, is the fact that it is a manufacturer of electrical equipment, and that RCA, NBC's sole stockholder, is a manufacturer of the same kind of equipment, and therefore a competitor of Philco, and the NBC is using the licenses here in question to the economic injury of Philco as a competitor of RCA.

If Philco has standing, on the basis assigned by the Court, every one of the numerous other manufacturers of electrical equipment has standing. And Philco and all of the others will have standing in every case in which NBC applies for a renewal of its license for any of its several stations.

The basis for standing approved by the Court for Philco is the naked fact that it, like NBC's sole stockholder, RCA, manufactures electrical equipment, and that NBC places

[* By a letter from the clerk of the court dated June 27, 1958, counsel were notified that this opinion had been changed by inserting the words "a preferential" here in place of the article "an".]

the name of RCA prominently before the public in the several ways recited in the Court's opinion. The reiteration of the name of RCA, thus making it familiar to the listening public, even though the products manufactured by RCA were not mentioned, must have advertising value, or the precious seconds required would not be so used.

The Court says that the question of economic injury giving standing "has not before arisen in the present context." That is true. The context, as I see it, is that of competitors in a field which has no relation to the business which is the subject of the public regulation in question. The FCC has nothing to do with the manufacture of electric toasters and washing machines and nothing here relevant to do with the manufacture of television and radio sets. NBC advertises RCA. If RCA pays NBC, it is just transferring money from one pocket to another, since it owns NBC. If it does not pay NBC, it, as owner of NBC, loses the revenue which it would receive if it sold the seconds in question to another advertiser, Philco, *e. g.*

Philco does not allege that it cannot buy time on NBC's Philadelphia station, or NBC's network, at the same price as any other advertiser. If it cannot afford to pay the price, or thinks the service is not worth the price, it is in the same position that all of us are in when we make our choices as to how to spend our funds.

In none of the cases cited by the Court was the alleged economic injury unrelated to the subject which was regulated by the public tribunal. In *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470 (1940), it was one radio station against another. In *Reade* v. *Ewing*, 205 F. 2d 630 (2d Cir. 1953), it was a consumer complaining of a producer of synthetic vitamins. In *Nat'l Coal Ass'n* v. *Federal Power Commission*, 191 F. 2d 462, 89 U. S. App. D. C. 135, it was coal against gas, and the legislative history of the statute showed that Congress expected the Federal Power Commission to consider the effect upon the interests of the producers of competing fuels of the licensing of extensions of natural gas pipe lines. In *City of Pittsburgh* v. *Federal Power Commission*, 237

F. 2d 741, 99 U. S. App. D. C. 113, it was gas against oil in a context similar to that in *Nat'l Coal Ass'n, supra.* In *Associated Industries* v. *Ickes,* 134 F. 2d 694 (2d Cir. 1943), it was consumers of coal against the authority having the power to fix the price of coal. In *National Broadcasting Company* v. *Federal Communications Commission,* 132 F. 2d 545, 76 U. S. App. D. C. 238, affirmed 319 U. S. 239, it was radio station against radio station.

The problem is really the broad one of whether a radio or television network should be permitted to be owned by the owner of any other business, whether that be the electrical appliance business, the air transportation business, the newspaper business, or any other. So long as such ownership is permitted, it would seem absurd to conclude that the owner could not advertise over his own facilities, though his competitors could do so. The solution of this broad problem of station or network ownership is not to be found in revoking, or refusing to renew the license of NBC's Philadelphia station. It must be accomplished by generally applicable legislation, or by regulation, if the Commission has the power to issue such a regulation. It should be done after due hearing properly announced, at which hearing the numerous persons and organizations interested would have the opportunity to present their views.

The "option time" and "must buy" practices of NBC, as to which the Court finds it unnecessary to decide, seem to me to present no serious problem with regard to standing. These do not even relate to Philco as a manufacturer of electrical equipment in competition with NBC's owner as such a manufacturer. If Philco has standing because of these practices, so does every enterprise which wants to advertise on television, and finds it expensive to do so, whether the enterprise sells cigarettes, soap, airplane tickets or rides on a bus. The court might, I think, have safely fenced out this infinite number of enterprises which might claim standing.

I am not willing to accompany the Court into the new field which it now enters, and must therefore respectfully dissent.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,166 April Term, 1958.

PHILCO CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

NATIONAL BROADCASTING COMPANY, INC.,

Intervenor.

United States Court of Appeals for the District of Columbia Circuit, Filed Jun 19 1958.

JOSEPH W. STEWART
Clerk

Appeal from an Order of the
Federal Communications Commission

BEFORE:

FAHY and WASHINGTON, Circuit Judges, and MADDEN, Judge, United States Court of Claims.

Judgment

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

On consideration whereof, it is ORDERED and ADJUDGED by this Court that the order of the Federal Communications Commission on appeal in this case be, and it is hereby, reversed, and that this case be, and it is hereby, remanded to the Federal Communications Commission for further proceedings not inconsistent with the opinion of this Court.

Dated: Jun 19, 1958.

Per Circuit Judge Fahy.

Separate dissenting opinion by Judge Madden.

APPENDIX B

Opinion and Order of the Federal Communications Commission

FCC 57-994
49068

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON 25, D. C.

In re Applications of NATIONAL BROADCASTING COMPANY, INC. Philadelphia, Pennsylvania For Renewal of Licenses of Stations WRCV, WRCV-TV, KA-4465, KA-7914, KC-8393 and KGC-93.	File Nos. BR-502 BRCT-4 BRTP-22 BRTP-133 BRTP-204 BRTS-21

MEMORANDUM OPINION AND ORDER

By the Commission: (Commissioner Bartley concurring in the result insofar as it dismisses the protest on the ground that the Philco Corporation is not a party in interest; Commissioner Ford not participating.)

1. The Commission has before it for consideration (a) a "Protest" filed on August 14, 1957, by Philco Corporation, Philadelphia, Pennsylvania, pursuant to Section 309(c) of the Communications Act of 1934, as amended, directed against the Commission's action of July 18, 1957, granting without hearing the above-entitled application[1];

[1] The Commission grant of each of the above-entitled applications was made subject to the following condition: "This action is without prejudice to whatever action the Commission may deem appropriate at such time as presently pending anti-trust actions involving Radio Corporation of America and the National Broadcasting Company, Inc., may be terminated."

(b) the "Opposition of National Broadcasting Company, Inc. to Protest of Philco Corporation" filed on August 26, 1957; (c) the "Brief in Reply" filed by Philco on September 4, 1957; and (d) the "Answer to Brief" filed by NBC on September 9, 1957.

2. Protestant claims standing as a "party in interest" within the purview of Section 309(e) of the Communications Act of 1934, as amended, because, as a "manufacturer competing with RCA in the sale of its products and as an advertiser affected by the restrictive practices of NBC[2] and the broadcasting stations which NBC owns and operates"[3] it will suffer economic injury if the grants of the above-entitled applications are permitted, "specifically by reason of the licensing to NBC of the Philadelphia television station (WRCV-TV). . . ." Inasmuch as protestant emphasizes, and particularly directs its allegations, which are hereinafter discussed, to the Commission's grant without hearing of the renewal application of Station WRCV-TV, a summary of the station's licensing history follows.

3. Station WRCV-TV (then WPTZ(TV)) was first licensed to the protestant on April 20, 1943. Prior thereto the station had been licensed on June 28, 1932, to the Philadelphia Battery Storage Company, the protestant's predecessor, as an experimental television broadcast station (call letters W3XE). On May 23, 1953, the Commission

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[2] NBC is a Delaware Corporation having authorized 100,000 shares of no par value voting stock of which 65,000 shares are outstanding and owned 100% by RCA.

[3] In addition to being the licensee of stations which are the subjects of the instant protest, NBC is the licensee of:

WRCA (AM, FM & TV, Ch. 4)	New York, New York
WRC (AM, FM & TV, Ch. 4)	Washington, D. C.
WMAQ (AM & FM)	Chicago, Illinois
WNBQ (TV, Ch. 5)	Chicago, Illinois
KNBC (AM & FM)	San Francisco, California

Furthermore, NBC is the permittee of WBUF (TV, Ch. 17), Buffalo, New York, and sole owner of the New Britain Broadcasting Company, licensee of WKNB (AM), New Britain, Connecticut and permittee of WNBC (TV, Ch. 30), New Britain, Connecticut.

granted the application for consent to the assignment of licenses of Station WPTZ(TV), and remote pickup facilities relating thereto, from protestant to Westinghouse Radio Stations, Inc. (now Westinghouse Broadcasting Co., Inc.) for a consideration of $8,500,000. In allocating the purchase price of $8,500,000 for Station WPTZ(TV), Westinghouse included as a major asset item in the purchase price the valuation of $5,000,000 for a network affiliation contract with NBC. Subsequently, on December 21, 1955, the Commission granted its consent to the assignment of licenses of Stations WTAM, WTAM-FM[4] and WNBK-(TV), Cleveland, Ohio, and all equipment relating to the operation of these stations, from NBC to Westinghouse, and the concurrent assignment of licenses of Stations KYW and WPTZ(TV)[5], Philadelphia, Pennsylvania, and the transfer of all related equipment pertaining thereto, from Westinghouse to NBC. This particular exchange in properties involved the payment by NBC of $3,000,000 to Westinghouse for Station WPTZ(TV). On July 18, 1957, the Commission granted without hearing the above-entitled applications conditionally (see footnote 1) principally because of pending civil anti-trust actions instituted by the Department of Justice against NBC and/or its parent company RCA.[6] It is against the Commission's latter

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[4] Also included in the assignment was the construction permit of WTAM-FM.

[5] KYW and WPTZ(TV) call letters were changed to WRCV and WRCV-TV, respectively, on February 13, 1956, pursuant to consent granted by the Commission on February 1, 1956.

[6] Civil Action No. 97-38 November 19, 1954, instituted against RCA in the U. S. District Court for the Southern District of New York. The complaint alleges, in essence, that "'defendant has attempted to monopolize, and has in fact monopolized . . . interstate trade and commerce . . . in radio-television research, patent holdings and patent acquisitions and the issuance of exchange of radio-television patent licenses, in violation of Section 2 of the Sherman Act."

Civil Action No. 21743, December 4, 1956, instituted against RCA and NBC in the U. S. District Court for the Eastern District of Pennsylvania, alleging, in substance, that the defendants, RCA and NBC, engaged in acts of monopoly or in restraint of trade as a result of the exchange of broadcast properties in Philadelphia and Cleveland between Westinghouse and NBC.

conditional grants that the subject "Protest" is directed.[7]

4. In support of its claim to standing, the protestant alleges, in substance, that it is a manufacturer and seller of electric appliances, equipment, and electronic devices[8] in direct competition with RCA; that RCA dominants [sic] the non-telephonic communications industry and directly, and through its subsidiaries or divisions[9], engages "on a large scale in the business of broadcasting, show business, news gathering, advertising, commercial communications, electronic research, repair and maintenance servicing, technical training education and patent licensing in addition to manufacturing an enormous variety of electronic and related equipment"; that RCA's wholly-owned subsidiary, NBC, "operates both radio and television networks, operates international broadcast stations and represents its own and 13 other broadcast stations (plus 5 others on a partial basis) in national spot advertising sales"; that through its subsidiaries NBC owns "substantial interests in other companies which produce broadcast

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[7] On March 13, 1957, and May 29, 1957, respectively, the Commission similarly granted on condition the application of the New Britain Broadcasting Company (a wholly-owned NBC subsidiary) for renewal of license of Station WNNB, New Britain, Connecticut and NBC's applications for renewal of licenses of Stations WRCA, WRCA-FM, WRCA-TV and Auxiliaries, New York, New York. The aforementioned grants were not protested.

[8] The products manufactured and sold allegedly consist of phonographs, radios, television receivers, tubes, transistors, microwave equipment, computers and other electronic devices, ranges, refrigerators, home freezers, air conditioners, and home laundry equipment.

[9] Besides NBC, and excluding foreign companies, RCA subsidiaries or divisions include RCA Victor Television, RCA Victor Radio & "Victrola", RCA Laboratories, RCA Institutes, Inc., RCA Service Company, Inc., RCA Communications, Inc., RCA Victor Distributing Corp., RCA Electron Tube, RCA Semiconductor, RCA Components, RCA Defense Electronic Products, and RCA Industrial Electronic Products.

shows and motion pictures"[10]; that NBC's owned television stations are so located as to give them "maximum strategic effect" and the "advantage and preferential publicity" which these television stations give to RCA over Philco and other competing manufacturers is enhanced "through the 5 radio stations and 4 FM stations which NBC owns"; that the "preferential publicity" which NBC stations afford RCA is "not available to Philco or other manufacturers who compete with RCA"[11]; that this "advertising" of RCA by NBC constitutes the "grossest and most harmful variety of unfair competition" and is contrary to the "explicit representation" made by NBC in its application (FCC Form 314) for permission to acquire Station WRCV-TV by its failure to disclose in said application its "intention to use the Philadelphia station as a source of advertising for its parent company"; and that NBC's "network option-time" and its "must buy" practices have "rendered the sponsorship of a network program in the preferred listening periods prohibitively expensive" and have "foreclosed the use of those periods to Philco on any non-network basis other than spot advertising," thereby subjecting the protestant to "injuries" in its capacity as an advertiser.

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[10] California National Productions, Inc., New York, N. Y., is a wholly-owned NBC subsidiary and Figaro, Inc., New York, N. Y. is 50% owned by NBC.

[11] The protestant claims that such "preferential publicity" is exemplified by (1) NBC owned stations inserting the phrase "a service of RCA" during station identification breaks; (2) "news" stories broadcast by NBC stations relate to RCA activities "which other news agencies do not find justified by their news value"; (3) broadcasts of NBC color television programs "again and again" advise the public that RCA is "the pioneer and developer of compatible color"; (4) the "Today" program, a NBC Network presentation, emphasizes its origination, when that is a fact, in "RCA Exhibition Hall" where RCA products are allegedly on display; and (5) NBC stations incorporate "RCA" and "RC" into their call letters, thereby giving RCA an "amount and type of advertising which Philco (and other competing manufacturers) cannot hope to obtain by however a large expenditure."

5. The protestant further contends, in substance, that a question as to whether grants of the above-captioned applications are in the public interest exists as a result of the number of civil anti-trust and patent licensing suits pending against RCA and or NBC;[12] that if the alleged "wrong doings" set forth in these suits are the least bit substantiated "neither RCA or NBC could possibly be awarded a grant which must be exercised in the public interest"; that the Commission has recognized the existence of this litigation by the conditions imposed on the renewal of licenses which are the subjects of the instant protest; that such conditional grants are insufficient to discharge the Commission's legal responsibilities imposed by Section 307(d) of the Communications Act which requires as affirmative finding that "public interest, convenience, and necessity would be served thereby"; that the Commission's

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[12] The following actions involve RCA and/or NBC:

Civil Action No. 982	December 17, 1946 (patent licensing)
Civil Action No. 1098	February 6, 1948 (patent licensing)
Civil Action No. 48 C 1848	December 7, 1948 (patent licensing)
Civil Action No. 1247 (consolidating Actions Nos. 982, 1098 and 1247)	August 9, 1949 (patent licensing)
Civil Action No. 89-103	November 9, 1953 (private anti-trust for treble damages)
Civil Action No. 97-38 (see footnote 6)	November 19, 1954 (Government anti-trust)
Civil Action No. 106-159	January 12, 1956 (private anti-trust for treble damages)
Civil Action No. 114-335	November 14, 1956 (private anti-trust for treble damages)
Civil Action No. 115-26	November 23, 1956 (unlawful appropriation of program idea and name)
Civil Action No. 21743 (see footnote 6)	December 4, 1956 (Government anti-trust)
Civil Action No. 21923	January 14, 1957 (private anti-trust for treble damages instituted by the protestant and its subsidiary, Landsdale Tube Company against RCA, General Electric Company, American Telephone and Telegraph Company, Western Electric Company, Inc., and Bell Telephone Laboratories, Inc.)

responsibility cannot be "shifted to the Department of Justice and the courts simply because there is an anti-trust litigation problem involved"; that in its "*Report on Uniform Policy As To Violation By Applicants Of Laws Of The United States*" (1 Pike & Fischer RR, Part III, 91; 495) the Commission has recognized that it has the duty and responsibility to consider violations of federal laws, other than the Communications Act, in evaluating applicants for broadcast facilities; that the Commission's "positive duty" to consider the question of NBC's qualifications to be a licensee is also underlined by reports of recent Congressional committee hearings[13] relating to the "propriety" of a number of NBC's practices; that from its inception in 1919, NBC's parent corporation, RCA, has "pursued a consistent course toward monopoly of the non-telephonic communications industry and as many as possible of its many and allied supporting arts"; and that its "long history of violating the anti-trust laws and engaging in predatory practices through the use of NBC owned stations" precludes the Commission from making the required Section 307(d) findings that the renewal of the above-entitled applications for renewal of licenses to NBC will be in the public interest. The protestant concludes that since the "continued ownership by NBC of its Philadelphia station is economically injurious" to the protestant, both as a competing manufacturer and advertiser with RCA by virtue of the latter's use of NBC and NBC owned stations

[13] Although protestant fails to identify the reports to which it refers by appropriate and proper citations, they are presumably the following: Hearings before House Committee on the Judiciary (Subcommittee No. 5) on Monopoly Problems in Regulated Industries (Television), 84th Cong., 2nd Session (1956), Vols. 1-4; Staff Report, "Television Network Practices," prepared for Senate Committee on Interstate and Foreign Commerce, 85th Cong., 1st Session (1957). The protestant further requests that these "reports be incorporated [in its protest] in full insofar as they deal with RCA and NBC." It is our view that such attempts to incorporate by reference the voluminous hearing records of Congressional committees, without specific page references, does not constitute the pleading of "allegations of fact" within the meaning of Section 309(c) of the Act.

to gain "unfair competitive advantages" over the protestant, the protestant, "as a party in interest, has a clear right to a full evidentiary hearing on these allegations and any other facts, matters and issues that may arise from the course of the evidentiary proceedings." The protestant, therefore, requests that the above-entitled applications be designated for an evidentiary hearing on the following specified issues:

"1. To determine whether the past history of anti-trust litigation and trade practices of RCA and of NBC, RCA's wholly owned subsidiary, and the current practices of both as revealed by pending litigation, by Congressional inquiry, by the Commission's own files, and otherwise, adversely reflect on NBC's character qualifications to own and operate this broadcast station in the public interest.

"2. To determine whether the renewal of the said license results in an undue concentration of control of the media of mass communication in the Greater Philadelphia area inconsistent with the public interest, convenience and necessity and contrary to Section 3.636 of the Rules of the Federal Communications Commission.

"3. To determine whether the renewal of the said license, taken together with the ownership and control by NBC of media of mass communication, and affiliation therewith both within and outside of the Greater Philadelphia area, results in an undue concentration of control of such media inconsistent with the public interest, convenience and necessity and contrary to Sections 3.636 and 3.658 of the Rules of the Federal Communications Commission.

"4. To determine whether, in view of the evidence adduced under the foregoing issues, the renewal of license of WRCV-TV Philadelphia, to NBC will serve the public interest, convenience and necessity."

6. In its opposition, NBC claims, in substance, that the instant protest fails to comply with the requirements of Section 309(c) of the Act in that the issues attempted to be raised are not supported by facts which are stated with particularity; that there is "no competition, direct or indirect, between NBC and Philco in Philadelphia or elsewhere"; that "absent competition, there can be no direct competitive injury" and, therefore, as a manufacturer, the protestant has no standing within the meaning of Section 309(c); that for the Commission to hold the protestant as a "party in interest" in its capacity as an advertiser would "open the floodgates to protests from tens of thousands of persons who have heretofore not had standing"; that the protestant has failed to "specify facts showing that a renewal of the instant licenses would not be in the public interest, and to raise any genuine issues for the Commission's consideration"; that the protest is "patently sham", and a "compendium of generalities assembled" for the purpose of using the Commission's procedure "as a weapon in its $150,000,000 treble damage action against RCA, and as a further publicity springboard to injure RCA and NBC."

7. The opposition further contends that there is no "impropriety" in NBC stations identifying themselves as "a service of RCA"; that it is a normal practice in the industry; that "NBC and other applicants for Commission approval have never interpreted" Question 9 of the Commission's Form 314 as applying to this practice; that the Commission has approved network ownership and operation of stations as being in the public interest; that NBC's "option time" and "network" policies are "perfectly consistent with the Commission's rules"; that it would not be appropriate for the Commission to order an evidentiary hearing on the anti-trust actions pending against RCA and or NBC; that the fact that "most of these actions have been pending for many years furnishes some indication of the scope of the charges involved and of the length of time it would take the Commission to resolve

these issues"; that the protestant's "review of RCA's history since its inception" fails to allege facts showing monopolization by RCA nor does it "charge an existing violation of law or of the Commission's rules"; and that the protest has been filed as a "publicity weapon by one who has no interest in the license renewal and no standing to protest it."

8. In its reply pleading entitled "Brief in Reply to Opposition to NBC to Protest of Philco Corporation,"[14] the protestant, in substance, reiterates and re-emphasizes certain of its allegations, by claiming that NBC's opposition ignores the basic question presented by the protest, to wit: the public interest involved. It is argued that the protest cannot be dismissed as an "abuse of process," nor does it require the Commission to enforce the anti-trust laws; that the protestant's standing as a "party in interest" within the meaning of Section 309(c) is well established; that the protest alleges with more than the requisite particularity the facts of which the Commission must take notice. Protestant cites a number of Commission and judicial decisions in support of its contention that the protest complies with the statutory requirements set forth in Section 309(c) of the Act.

---

[14] The protestant's reply pleading was filed on September 4, 1957. Although Section 309(c) of the Act does not provide for the filing of oppositions and replies thereto, we have, as a matter of policy, accepted such pleadings provided they were submitted within the filing limitations imposed by Section 1.730 of the Commission's Rules relating to the filing of oppositions to petitions and replies to such oppositions. Section 1.730 provides that replies to oppositions "must be filed within 5 days after such oppositions are filed with the Commission." Section 1.733 provides that in computing the above time requirements, "When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation." NBC's opposition to the protest was filed on August 26, 1957. Thus, since August 31 was a Saturday, September 1 a Sunday, and September 2 a holiday, the last day for due filing of the protestant's reply was September 3, 1957. Nevertheless, we have given consideration to the content of the reply pleading, and our conclusions herein were reached after such consideration.

9. Section 309(c) of the Communications Act provides, in substance, that within thirty (30) days after the grant without hearing of an application, any "party in interest" may file a protest directed against such grant, provided that such a protest contains allegations of fact which show the protestant to be a "party in interest." The standards for determining whether a person is a "party in interest" for the purposes of maintaining a protest are not delineated in Section 309(c) or elsewhere in the Act. However, it is well established that the test provided by the *Sanders* case[15], the touchstone of any determination of who is a "party in interest" from an economic standpoint under Section 309(c), is one of *direct* and *immediate* competitive injury which gives "standing" without reaching the level of a legal right. See *Associated Industries* v. *Ickes*, 134 F. 2d 694 (2nd Cir. 1943); *United States Cane Sugar Refiners' Assn.* v. *McNutt*, 138 F. 2d 116 (2nd Cir. 1943); *National Coal Association* v. *Federal Power Commission*, 191 F. 2d 462 (D. C. Cir. 1951). Further, the injury must be reasonably certain and definite, and not nominal or speculative. *National Broadcasting Co. (KOA)* v. *Federal Communications Commission*, 132 F. 2d 545 (D. C. Cir. 1942); aff'd 319 U. S. 239 (1943). In the *KOA* case, the Court of Appeals stated the latter requirement thusly, at page 548.

> "Presumably by the decision in the Sanders case the Supreme Court intended that the financial injury must be something more than nominal or highly speculative. It seems not unreasonable to read the opinion as requiring by implication that there be probable injury of a substantial character."

It is therefore incumbent upon a protestant, in meeting the "party in interest" requirement of Section 309(c), to establish that the grant complained of has resulted in or is reasonably likely to result in some injury of a direct, tangible and substantial nature. *T. E. Allen & Sons*, 9

[15] *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470 (1940).

Pike & Fischer RR 197; *Midwest Television, Inc.*, 9 Pike & Fischer RR 611; *Ohio Valley Broadcasting Corporation*, 10 Pike & Fischer RR 452. As we stated in the *Midwest* case,

> "The significance of a clear showing of causal relationship between the action being protested and the alleged economic injury cannot be minimized in this or any similar case since it is a jurisdictional factor which determines whether the protestant has shown standing as a party in interest to protest."

10. When we examine the Philco protest we think it clear that it fails to make any showing as to the probability of substantial immediate injury to Philco if the protested grant is made final. The NBC Philadelphia station, to the extent profitable, will aid NBC financially, and thus indirectly increase the profits of NBC's parent RCA, with which Philco is in competition in another line of commerce.[16] But certainly this is not enough to give Philco standing, any more than it would give standing to a manufacturer of washing machines—a product of another subsidiary of RCA. There must at least be a showing of probable direct loss to the protestant and not merely such indirect injury as might conceivably result from generally strengthening its competitor.[17]

11. We think it equally clear that Philco is not adversely affected by NBC ownership of a Philadelphia television station because of certain alleged practices of NBC as a network to which the protest adverts. These include both those types of practices such as option time abuses and "must buy" requirements allegedly injurious to Philco in its capacity as an advertiser, and the alleged facts that NBC makes frequent references to RCA in connection with its network color programs, the "Today" program, its

[16] Electronic manufacturing as contrasted with radio and television broadcasting.

[17] It is to be noted that the station in question was previously owned by Philco, which sold it to Westinghouse for $8,500,000.

regular network announcements, etc. With respect to all of these matters, it is clear that Philco would be in exactly the same position if NBC owned no station in Philadelphia and its programs were carried over an independently owned affiliate. Since renewal or lack of renewal of WRCV-TV could not affect Philco with respect to this category of action, they do not, even if we assume *arguendo* that they in fact injure Philco, make it aggrieved by the protested grant.

12. This leaves for consideration the miniscule residue of Philco's allegations of injury. It does not allege NBC, in its ownership and operation of WRCV-TV, has unfairly discriminated against Philco, either in its news or other programming or its advertising practices. It suggests only that by such actions as the use of call signs related to the RCA trademark symbol, by announcements of the station as "a service of RCA", and by occasional favorable news mentions of RCA developments, NBC's ownership of a Philadelphia television station aids RCA in its competition with Philco in the manufacture and sales of electronic equipment. We think it clear that any real impact on Philco's competitive position of such activities is so speculative and so indirect that it would make a mockery of the concept of "party in interest" to apply it to these facts.

13. We recognize that the courts have in a number of cases constructed the term "party in interest" broadly where the facts of a particular action would lead a reasonable man to conclude that the complaining party was "likely to be financially injured." *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 477; see *Metropolitan Television Company* v. *Federal Communications Commission*, 95 U. S. App. D. C. 326, 221 F. 2d 879; *National Coal Association* v. *Federal Power Commission*, 89 U. S. App. D. C. 135, 191 F. 2d 462; *City of Pittsburgh* v. *Federal Power Commission*, 99 U. S. App. D. C. 113, 237 F. 2d 741. But in all of the cases of which we are aware in which standing as a "party in interest" or "person

aggrieved or adversely affected" has been found to exist, the relationship between the agency action complained of and the interest of the complaining party were far more direct and immediate than they are here.

14. Thus, in the *National Coal Association* case, *supra*, coal producers and the United Mine Workers were found to be aggrieved by an action of the Federal Power Commission which, by granting a certificate authorizing the construction of a natural gas pipe line to serve Oak Ridge, Tennessee, threw open an area previously solely dependent upon coal for fuel, for immediate and direct competition by purveyors of natural gas. The situation there, in other words, was closely analogous to the one existing in *Ohio Valley Broadcasting Corp.*, 12 Pike & Fischer RR 452, affirmed on this point *sub nom, Clarksburg Publishing Co.* v. *Federal Communications Commission*, 96 U. S. App. D. C. 211, 225 F. 2d 511, where we found a newspaper had standing to protest the grant of a television station in the community which the newspaper served because of the direct competition for advertising revenues which would be created as a result of the Commission action. Here, of course, the action of the Commission renewing NBC's television license in Philadelphia has, as indicated above, nothing like this real competitive impact on Philco.

15. The *City of Pittsburgh* case, *supra*, also clearly involved an action by the agency having much greater direct impact upon the appellant than is the case here. For in that case the action of the Federal Power Commission authorizing the abandonment of one pipe line and conversion of another which could serve Pittsburgh to meet the needs of the abandoned line directly and immediately affected the interests of the City of Pittsburgh as a consumer of natural gas because of the effect of such action, in the court's view, precluded the possibility of expansion of the facilities serving Pittsburgh in order to meet increasing needs of the consumers in that city. Similarly, in *Metropolitan Television Company* v. *Federal Communications Commission*, *supra*,

the Commission action complained of resulted in objectionable interference being caused for the first time to a not insignificant area to which the protestant station provided service. The protesting station had shown in detail, in its protest, that in seeking advertising accounts it placed great emphasis on its wide area coverage, including coverage of the area which would receive interference. The Court of Appeals concluded that the showing was sufficient to show that it was likely to be financially injured in its competition with other advertising media in the area similarly basing their selling themes upon wide area coverage.

16. We have gone into these cases at some length because they represent the extreme limits of situations in which the courts have found standing upon allegations of financial aggrievement, and because we believe the facts of this case, as set forth above, clearly demonstrate that the protestant has not even approached making the showing that was present in these situations. When Congress adopted the protest procedure in 1952, it adverted, in the Senate Committee Report on the bill, to the fears which had been expressed that the term might be subject to too broad an interpretation. It rejected this contention stating (S. Rep. 44, 82 Cong. 1st Sess., p. 8):

> "Fear has been expressed that use of 'parties in interest' might make possible intervention into proceedings by a host of parties who have no legitimate interest but solely with the purpose of delaying license grants which properly should be made. The Committee does not so construe the term 'party in interest': 'parties in interest' because of electrical interference are fixed and defined by the Supreme Court decision in the KOA case (319 U. S. 239) and the Commission's rules and regulations; 'parties in interest' from an economic standpoint are defined by the Supreme Court decision in the Sanders case (309 U. S. 470)."

We think that the present protestant has clearly failed to make any showing of probable substantial immediate injury of the type which even the most liberal interpretation of the term "party in interest" has heretofore determined to be sufficient. We must, accordingly, conclude that Philco has not shown itself to be a party in interest to the grant of renewal of NBC's license for television station WRCV and that the protest must accordingly be dismissed.

17. Notwithstanding our finding that the protestant has failed to show that it is a "party in interest", in this case as well as in all other instances, the Commission will consider any facts brought to its attention which bear on the question whether its "grant was improperly made or would otherwise not be in the public interest." As is indicated above, issue "1" specified by protestant seeks a determination by the Commission with respect to "the past history of antitrust litigation and trade practices of RCA and NBC." The various outstanding suits listed by protestant were filed in the respective federal courts between 1946 and 1957. We reiterate the view which we have expressed on many occasions in the past, namely, that in circumstances such as those which pertain herein, the Commission will not act on unresolved complaints filed in the courts but will be guided by the determinations reached by said courts with respect to the allegations contained in said complaints. Consistent with this view, the Commission granted the above-entitled application subject to the condition that its action was "without prejudice to whatever action the Commission may deem appropriate at such time as presently pending antitrust actions involving Radio Corporation of America and the National Broadcasting Company, Inc., may be terminated." *In re New Britain Broadcasting Company*, 13 Pike & Fischer RR 915.

18. Issues "2" and "3" seek determinations with respect to violations of the Commission's multiple ownership rules and its network rules. These questions have been raised in the past and have been resolved in favor

of the applicant. To the extent that these matters are involved in pending litigation, we shall await the determination of the courts. Otherwise, we find no basis in the protest for holding a hearing on said issues. Issue "4" is based on findings reached under the other issues and raises no independent questions. *In re New Britain Broadcasting Company*, 14 Pike & Fischer RR 725.

19. In light of the above, the Commission concludes that the protestant has not shown that the Commission's action of July 18, 1957, granting the above-entitled applications was improperly made or was otherwise not in the public interest. Accordingly, the protest herein Is Dismissed.

Federal Communications Commission

/s/ Ben F. Waple

Ben F. Waple
Acting Secretary

[Seal]

Adopted: September 11, 1957

Released: September 16, 1957

APPENDIX C

Relevant Sections of The Communications Act

§309. Application for license—Examination; action by Commission

(a) If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

• • •

PROTEST; TIME; FINDINGS; REDRAFT OF ISSUES; BURDEN OF PROOF; POSTPONEMENT OF GRANT

(c) When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) of this section, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except in respect to such matters as to which the Commission after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. The Commission may in such decision redraft the issues urged

by the protestant in accordance with the facts or substantive matters alleged in the protest, and may also specify in such decision that the application be set for hearing upon such further issues as it may prescribe, as well as whether it is adopting as its own any of the issues resulting from the matters specified in the protest. In any hearing subsequently held upon such application issues specified by the Commission upon its own initiative or adopted by it shall be tried in the same manner provided in subsection (b) of this section, but with respect to issues resulting from facts set forth in the protest and not adopted or specified by the Commission, on its own motion, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of ~~the~~ Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commissioner shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing.

• • •

§402. Judicial review of Commission's orders and decisions—Procedure

• • •

RIGHT TO APPEAL

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved of whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

* * *

INTERVENTION

(c) Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

* * *

FINALITY OF DECISION; REVIEW BY SUPREME COURT

(j) The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 374

NATIONAL BROADCASTING COMPANY, INC., *Petitioner*,

v.

PHILCO CORPORATION, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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October 16, 1958

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A of Petition) is reported at 17 Pike & Fischer R.R. 2054. The memorandum opinion and order of the

Federal Communications Commission (Appendix B of petition) is reported at 15 Pike & Fischer R.R. 965.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Where the Federal Communications Commission grants the renewal of a broadcast license without holding a hearing, does a party who alleges that the grant has caused it substantial economic injury have standing to seek a hearing under Section 309(e) of the Communications Act to show that the grant is violative of the public interest, convenience and necessity?

STATUTES INVOLVED

The relevant provisions of the Communications Act of 1934, as amended, 47 U.S.C. 151, *et seq.*, are Sections 309(e) and 402(b), pertinent portions of which are set forth in Appendix C of the Petition.

STATEMENT

This proceeding originated with the application of the National Broadcasting Company (NBC) for renewal of certain broadcast station licenses in Philadelphia, Pennsylvania. The Federal Communications Commission (Commission), without a hearing on the applications, granted the license renewals on a conditional basis. Philco Corporation (Philco), invoking Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. 309(e), filed a protest against these renewal authorizations on the grounds that they were improperly made and otherwise contrary to the public

interest. (R. 5-27) The protest contained detailed allegations of fact substantiating this claim, and sought a full evidentiary hearing upon the following issues (R. 26-27):

"1. To determine whether the past history of antitrust litigation and trade practices of RCA and of NBC, RCA's wholly owned subsidiary, and the current practices of both as revealed by pending litigation, by Congressional inquiry, by the Commission's own files, and otherwise, adversely reflect on NBC's character qualifications to own and operate this broadcast station in the public interest.

"2. To determine whether the renewal of the said license results in an undue concentration of control of the media of mass communication in the Greater Philadelphia area inconsistent with the public interest, convenience and necessity and contrary to Section 3.636 of the Rules of the Federal Communications Commission.

"3. To determine whether the renewal of the said license, taken together with the ownership and control by NBC of media of mass communication, and affiliation therewith, both within and outside of the Greater Philadelphia area, results in an undue concentration of control of such media inconsistent with the public interest, convenience and necessity and contrary to Section 3.636 and 3.658 of the Rules of the Federal Communications Commission.

"4. To determine whether, in view of the evidence adduced under the foregoing issues, the renewal of the license of WRCV-TV, Philadelphia, to NBC will serve the public interest, convenience and necessity."

Philco's protest also contained allegations of fact which showed it to have suffered direct and substantial

economic injury as a result of this grant and claimed that such economic injury made it a "party in interest" with standing to protest under Section 309(c). The facts alleged include the following:

> Philco is in direct competition with RCA as a manufacturer and the grant of this station to NBC strengthened RCA's competitive position to such a degree as to cause substantial direct economic injury to Philco (R. 6). NBC's ownership of the Philadelphia station aids RCA in its competition with Philco by broadcasting preferential programming featuring RCA and by giving RCA certain advertising advantages (R. 7-9). These preferential practices, which Philco and other competitors of RCA can not hope to obtain by however large an expenditure, constitute the grossest and most harmful variety of unfair competition (R. 9). RCA's monopolization in the field of research, patent acquisition, holding and licensing in radio and television as charged by the U. S. Government and others is seriously detrimental to Philco as a manufacturer, and NBC is directly instrumental in expanding the adverse effects of RCA's practices through ownership and operation of its Philadelphia station (R. 8-9). Certain practices of NBC in operating its Philadelphia station, such as option time abuses and "must buy" requirements, seriously injure Philco as an advertiser since these devices render sponsorship of network programs in the preferred listening period prohibitively expensive and deprive Philco of any vestige of choice as to the markets in which it wishes to concentrate sponsored program television advertising (R. 10-11).

By memorandum opinion and order (R. 74-91), the Commission dismissed Philco's protest on the ground that Philco was not a proper party in interest to bring these matters to the attention of the Commission.[1]

Philco appealed to the United States Court of Appeals for the District of Columbia Circuit under Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b). The petitioner, NBC, intervened in that appeal. The lower court determined that Philco's protest contained allegations of fact which showed that the renewal of the station licenses in question cause Philco substantial economic injury and, therefore, that Philco did have the requisite standing to advance the public interest issues before the Commission. The Commission's order dismissing the protest was reversed and the case was remanded for further proceedings. Judge Madden dis-

[1] The Respondent believes, and so contended in the lower court, that the Commission's dismissal of its protest was also based upon another separate ground, i.e., that Philco's public interest allegations, if proven, were not sufficient to require a denial of the renewal applications. Before the Court of Appeals, the Commission insisted that its dismissal of the protest was based upon the standing question only and that other language in its opinion was gratuitous and of no decisional effect. The lower court agreed with the Commission and limited the scope of its review as follows:

> "Our question is only whether Philco has standing by filing a protest to advance reasons which might influence the Commission in making a decision in the public interest with respect to the renewals. Indeed, assuming such standing we are not now concerned even with the sufficiency of Philco's protest to warrant a hearing, a question not yet passed upon by the Commission." (Appendix A of Petition, p. 3a)

Since the petition for certiorari concerns only the question of Philco's standing as a party in interest, the Respondent will similarly limit the scope of this opposition.

sented from this decision (Appendix A of Petition, pp. 6a-8a). The dissent does not disagree with the holding of the majority that Philco's protest contained allegations of fact showing it to have suffered economic injury as a result of license renewals in question. Despite this, however, the dissenting judge would deny Philco's right to protest since, in his view, the allegations of economic injury were "unrelated to the subject which was regulated by the [Commission]."

ARGUMENT

In its efforts to avoid a hearing on the vital public interest issues raised in Philco's protest, NBC has filed a petition for a writ of certiorari which discloses no important public question not already settled by this Court and various courts of appeal; nor does the petition reveal any conflict between the decision of the lower court and any other federal court decision.

Instead, the petitioner attempts, without supporting authority, to impose a new standard for determining whether a party has sufficient standing to file a protest under Section 309(e) of the Communications Act challenging a grant in the public interest. The petition makes no claim that the decision below conflicts with any other decision on the same matter of law and fact; rather, it strains to show an inconsistency in application of general principles.

Actually, the lower court's decision is based upon a strict application of the well-established legal test regarding standing. It is perfectly consistent with the long line of previous decisions on this subject and is manifestly correct.

I.

The Public Question Presented by This Case Has Been Authoritatively Settled by This Court and the Decision Below Is Clearly Correct

The question presented to and decided by the court below was whether the allegations of Philco's protest were sufficient to qualify it as a "party in interest" within the meaning of Section 309(e) of the Communications Act. This question involves no novel principles of law. The requirements necessary for standing to advance public interest issues before an administrative tribunal have been authoritatively established by this Court and consistently applied by various courts of appeal and administrative agencies.

The landmark decision in this field is *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940). In this case the court held that "one likely to be financially injured by the issue of a license" has standing "to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license" (309 U.S. at 477).

The Congress, in enacting Section 309(e), expressly adopted as the definition of "party in interest" the standard set forth in the *Sanders* decision. As stated in the Senate Report on the bill:

> "... 'parties in interest' from an economic standpoint are defined by the Supreme Court decision in the Sanders case (309 U.S. 470)." S. REP. No. 44, 82d Cong., 1st Sess., 8 (1951).

The "likelihood of economic injury" test has been consistently followed by the courts and was strictly applied by the court below. After restating the principle that a person likely to be economically injured

by an authorization of the Commission has standing to bring to the Commission's attention errors of law it committed in making the grant, the court examined the allegation of the protest. It found that these allegations showed not only that Philco *was likely* to be injured, but that it had *actually* been injured by the protested grant. Once this determination had been made the court's conclusion was inevitable since this is the only test which need be met by a "party in interest." The court therefore held that Philco has standing "to file its protest, and, if the protest is found legally sufficient, to advance the alleged anti-trust and other practices for consideration by the Commission in passing upon the renewal applications."

The petitioner seems to recognize that the authorities have uniformly considered likelihood of economic injury as the test in cases involving standing. However, it is argued that something more is required in the present case. In addition to alleging economic injury as a result of the grant, the petitioner would require that Philco meet what can only be characterized as an occupational test. Philco is variously described in the petition as "not even a member of the 'industry at large'", and as having "no interest in the broadcasting business" (Petition, p. 10). This unique theory of limiting standing to members only is highly discriminatory and fortunately was not the test adopted by Congress. Economic injury hurts regardless of a person's occupation and Congress, wisely, did not attempt to discriminate between those so injured.

The petitioner cites no authority for its unusual proposition but rather seeks to infer its validity from the fact that in many cases dealing with standing the aggrieved party was also engaged in an industry regu-

lated by the agency whose order was contested. Aside from the fact that legal principles are not so coincidentally established, the cases relied upon by the petitioner offer no support for such a thesis. Rather, they are based solely on the injury inflicted and not the occupation of parties.[2] Also, of course, there are many important cases where the persons granted standing were not subject to the regulatory powers of the agency. *City of Pittsburgh* v. *Federal Power Commission*, 99 U.S. App. D.C. 113, 237 F. 2d 741 (the City of Pittsburgh and certain barge operators); *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 96 U.S. App. D.C. 211, 225 F. 2d 511 (a newspaper publisher); *Associated Industries* v. *Ickes*, 134 F. 2d 694 (consumers of coal); *Reade* v. *Ewing*, 205 F. 2d 630 (a consumer of oleomargarine).

The Federal Communications Commission, which is charged with the responsibility of determining in the first instance whether a protestant is a proper party in interest, has expressly rejected the petitioner's theory. In *Ohio Valley Broadcasting Corp.*, 10 Pike & Fischer RR 452, 455, the Commission stated:

> "[N]either Section 309(e) of the Act, the Sanders decision nor subsequent decisions stemming therefrom limit persons entitled to standing to object to agency action to those engaged in the same type

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[2] For example, in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, *supra*, standing was allowed solely on the basis of the economic injury alleged by the appellant. The court explained: "Congress may have been of the opinion that *one likely to be financially injured* . . . would be the only person having sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license." 309 U.S. at 477. (Emphasis added.)

> of business engaged in by the beneficiary of the agency action complained of."[3]

On appeal, the court concurred in the Commission's determination with respect to the protestant's standing. *Clarksburg Publishing Co.* v. *Federal Communications Commission, supra.*

Above all, the argument is just not relevant to the facts of this case. Philco is "engaged in the same type of business engaged in by the beneficiary of the agency action complained of." The protest clearly sets out that Philco as an electronics manufacturer is in direct competition with RCA and that RCA is the beneficiary of the grant complained of. Even the petitioner recognizes that no distinction should be made between RCA and NBC in determining the ownership of the station in question. (See page 14 of Petition, where advertising benefits inuring to RCA are justified as the normal industry practice of the identification of the *station owner.*)

The petitioner attempts to justify its adoption on the ground that the administrative tribunals and courts will otherwise become overburdened and clogged. This concern of NBC is evidently not shared to the same degree by the tribunal which would be affected, since it is noted that the Commission has not sought the review of this Court in these proceedings. Of course, there is no cause for the alarm which the petitioner proclaims. The tired argument that standing

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[3] Section 402(b) of the Act is also irreconcilable with petitioner's theory. That section authorizes appeals "*by any other person* who is aggrieved or whose interests are adversely affected." (Emphasis added.) The language is broad and it is clear that the only standard is whether a person is aggrieved.

to challenge invalid administrative orders should be drastically limited so that the tribunals will not be overworked shows a complete disregard for the public interest, the protection of which is the purpose of such proceedings. Such an argument was laid to rest by Judge Frank's well-reasoned opinion in *Associated Industries* v. *Ickes, supra.* In that case the court held that hundreds of thousands of coal consumers had standing since they met the established test of economic injury. Warned that such a holding would result in impairing the effective administration of the statute involved, the court replied:

> "There are no such horrendous possibilities. A review proceeding must be brought within sixty days after the entry of the Commission's order and only in one of the Circuit Courts of Appeal. . . ." 134 F. 2d at 707.

The procedural safeguards under Section 309(c) of the Communications Act are even more apparent. Protests of grants made without a hearing must be filed within thirty days of the order. Significantly, the Act does not set down the protest for a hearing, but rather specifies that it is the *application* for the grant which is designated for hearing. Thus, a particular grant can be subject to but one hearing regardless of the number of protests filed.

It is apparent that the allegations in the protest showed, *inter alia*, that the license renewals gave to RCA a substantial preferential advantage over Philco. The advantages so obtained involved advertising preferences in a medium which is known to have an extraordinary impact on the public. The court recognized that such a preferential competitive advantage was economically injurious to Philco. Applying the

established legal principle involved, it concluded that Philco had standing as a party in interest. Clearly, the decision is eminently correct and the petitioner's arguments are without substance or authority.

II.

There Is No Conflict of Decisions

There is no claim by the petitioner—and of course there could not be—that the lower court's decision is directly conflicting with the holding of any other decision on the same matter of law and fact. Rather, the petitioner asserts that the opinion of the lower court is somehow inconsistent with the "principles" established in various other appellate decisions. In Part 2 of its petition the petitioner switches its attack, and apparently accepts the legal standard which it had previously claimed to be insufficient. Here it challenges the court's interpretation of the facts. The gist of this second approach is found in the general statement (Petition, p. 12): "The injury Philco asserts, if it exists at all, does not result from the Commission's action here in any realistic sense."

That NBC should so interpret Philco's allegations is not surprising. However, it is not the interpretation adopted by the Court of Appeals. The court examined the allegations of economic injury set forth in Philco's pleading and found that Philco had alleged injury both as an advertiser and as a manufacturer in competition with NBC's sole stockholder, RCA. The court found it unnecessary to consider the injuries alleged by Philco in its capacity as an advertiser, i.e., a consumer, since it concluded that there was sufficient basis for Philco's standing in the economic injury it claimed as a manufacturer. In so concluding, the court

was satisfied that even the Commission's characterization of Philco's allegations in this regard met the necessary requirements.[4]

The petitioner takes great pains to distinguish the facts presented in this case from those in other standing cases. It need not try so hard. Most cases differ in their factual setting to some degree. The important indistinguishable fact in all of these cases, however, is that each of the parties granted standing had alleged a likelihood of economic injury.

In grasping for straws, the petition makes much of the fact that the lower court's opinion limited its holding to the case which is was deciding.[5] This of course

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[4] Philco's actual allegations showed aggrievement of a far more substantial and direct nature than is contained in the Commission's summary of those allegations. While Philco does not agree that the Commission's summary which the court incorporated into its decision is completely accurate, it does agree with the court's conclusion that even this version of the alleged facts showed sufficient injury as a result of the grant to give it standing.

[5] An even more striking example of straw-grasping is seen in the imaginative interpretations which the petitioner finds hidden in an order of the court changing the wording of the opinion as originally issued to insert the words "a preferential" for the article "an" in one of its sentences. The speculative arguments indulged in by the petitioner are interesting, but, perhaps unfortunately, this minor amendment can be more logically attributed to such a mundane reason as a stenographer's error or a proofreader's haste. The sentence, as corrected, reads: "Our decision gives standing to a competitor in the position of Philco only to protest a renewal after it is known that licensed facilities are being used by the competing manufacturer directly to obtain a preferential economic advantage over the protestant." In substance, the insertion of the word "preferential" might be considered unnecessary. It does, however, more accurately describe Philco's allegations, and leaves no room for doubt that such an advantage is injurious.

is only commendable appellate practice. To "leave other situations for other cases" is only proper and lends strength to the decision rendered instead of creating confusion in attempting to cover too broad an area. While it seems unnecessary to repeat, the fact remains that the court decided simply that Philco had standing under Section 309(e) because it was economically injured by the grant in question.

We come now to the cases which the petitioner claims are in clear conflict "in principle" with the decision below. *Pittsburgh Radio Supply House* v. *Federal Communications Commission*, 98 F. 2d 303 (D.C. Cir., 1938) is cited as a case involving broadcast licensees "held to lack standing to challenge Commission action even though they had far more substantial and immediate interests than Philco has here" (Petition, p. 15). An examination of this case, however, reveals nothing of the kind. Involved were appeals by three radio station licensees contesting an order of the Commission allowing another station to change its frequency and increase its power. The appeals were denied for lack of standing. The reason was clear. The court stated that the appellants had not made any claim "under 402(b)(2) that they will suffer financial or economic injury, loss of patronage, or loss of listening audience" (98 F. 2d at 305). This would seem to prove only that one must claim aggrievement in order to be considered aggrieved. One of the appellants in this case did make a charge that the Commission's grant would result in electrical interference. The court disposed of this as follows: "As to this charge the evidence unmistakably shows that the operation of Waterbury . . . will not interfere with Pittsburgh . . ." (98 F. 2d 305-06). The conflicting principles are not apparent.

The petition also refers to *WOKO, Inc.* v. *Federal Communications Commission*, 109 F. 2d 665 (D.C. Cir., 1939), a case which was dismissed by the Court of Appeals not because the appellant lacked standing but because the appellant had alleged no facts to show that the Commission's order was contrary to the public interest. There is language in the opinion of the court to the effect that the injury alleged to give standing would not be sufficient "unless it also appeared that, as a result of such injury, the public interest, convenience, or necessity would suffer" (109 F. 2d at 668). While this language was unnecessary to the actual holding of the case, the reasoning of the court has been discredited in later cases, as the petitioner points out (Petition, p. 15, Note 12).

The majority opinion in the case below was careful to avoid the erroneous dicta of the *WOKO* decision. The dissent, however, is predicated upon it. As the majority so clearly and correctly stated: "Of course the public considerations advanced by such a party, as distinct from the reasons which gave rise to standing, must stand on their own feet under the criteria which govern the Commission in passing upon the merits of the applications" (Petition, Appendix A, p. 5). The courts have been consistent in adhering to this principle, and to the extent that the *WOKO* decision, Judge Madden's dissenting opinion, and the petitioner's argument are inconsistent they are clearly erroneous.[6]

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[6] In this regard, it is apparent from Judge Madden's dissenting opinion that he misconceived the purpose of Section 309(e) as well as the content of Philco's protest. He stated (Petition, Appendix A, p. 8): "The problem is really the broad one of whether a radio or television network should be permitted to be owned by

In *Mansfield Journal Co.* v. *Federal Communications Commission*, 173 F. 2d 646 (D.C. Cir. 1949), the appellant seeking standing to challenge the grant of a station license was merely an applicant for a construction permit "which it may never obtain" (173 F. 2d 647-48). Appellant's likelihood of injury was completely dependent upon its being successful in acquiring this permit. In its existing state it could never be injured by the grant. This is clearly distinguishable from the present case, where Phileo was actually injured by the grant and the likelihood of future injury was not dependent upon any subsequent event.

KFAB Broadcasting Co. v. *Federal Communications Commission*, 177 F. 2d 40 (D.C. Cir. 1949), is similar in its holding to the *Mansfield Journal* case, *supra*. At the time the order appealed from in that case was entered by the Commission, the appellant was not aggrieved by it and did not so claim. Subsequently another action of the Commission caused the appellant to seek a reversal of the first order. The court held:

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the owner of any other business. . . . So long as such ownership is permitted, it would seem absurd to conclude that the owner could not advertise over his own facilities, though his competitors could do so." This implies that it is necessary for a protestant's aggrievement to be the result of some illegal or prohibited action. Of course this is not the case. There is nothing inherently illegal about the addition of a radio station to a community, yet the addition might very likely injure an existing station. *FCC* v. *Sanders Bros. Radio Station*, *supra*. In fact the injury giving rise to standing is more often the result of perfectly legal action on the part of the grantee than not. The question of standing must be considered apart from the public interest issues raised by a protestant. "[T]he mere fact that . . . [a party] will suffer . . injury from the operation of the . . . station entitles him to demand a hearing. . . ." *Camden Radio* v. *Federal Communications Commission*, 94 U.S. App. D.C. 312, 318, 220 F. 2d 191, 196 (1955).

> "[T]hat a person not aggrieved or affected by an order when it is entered, does not become aggrieved or affected by that order, within the meaning of this statute, upon the happening of some subsequent event, which changes his status." 177 F. 2d at 42.

This again is in no way similar to Phileo's claim of aggrievement.

Southwestern Publishing Co. v. *Federal Communications Commission*, 243 F. 2d 829 (D.C. Cir. 1957), simply stands for the proposition that the person seeking standing as a party in interest must itself be aggrieved. Thus, a company which sought standing was held not to satisfy the standard, since the alleged injury ran to a different company which was the actual "party in interest."

Clearly, in these cases the standard established by the *Sanders* decision was not met. The legal principles applied by the courts were identical to those applied by the lower court in this case. There is no conflict in the principles. The only difference is that Philco was injured by the grant in question while the parties in the cases just cited were not.

The petitioner also claims that if Philco is aggrieved it is not because of the grant by the Commission, but rather, because of the activities of the licensee. Again, this is not a new argument. As stated in *Greenville Television Co.* v. *Federal Commun. Com'n*, 95 U.S. App. D.C., 314, 316, 221 F. 2d 870, 872 (1955):

> ". . . the economic injury that gives standing, under Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470, 60 S. Ct. 693, 84 L. Ed. 869, 1037, to oppose Commission action, is seldom if ever a direct result of Com-

> mission action. Even the grant of a new station license does not automatically take advertising revenue away from existing licensees, but only creates a situation in which the new licensee may be able to get the revenue by private negotiation, yet existing licensees are 'adversely affected' and 'parties in interest'."

Similarly, in *Camden Radio* v. *Federal Communications Commission*, *supra*, 220 F.2d 191, at 195, the court held that the appellant was a party in interest "entitled under §309(c) of the Act to protest and be heard, when he alleges he will suffer economic injury *from the operation of the new station.*" (Emphasis added.)

It is splitting hairs to claim that an administrative order is not injurious, but that the effectuation of the order is. To seek such hair-splitting from this Court is certainly not a ground for the issuance of a writ of certiorari.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 16, 1958

FILE COPY

Office-Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

No. 371

In the Supreme Court of the United States

OCTOBER TERM, 1958

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

PHILCO CORPORATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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MEMORANDUM FOR THE UNITED STATES

Pursuant to the Court's invitation of November 10, 1958, there is attached hereto a statement of the Federal Communications Commission setting forth its views in this case. It is the Commission's conclusion, set forth in its Statement, that the Court of Appeals has misconceived the statutory scheme and that the decision creates a precedent which can have a disruptive effect upon the Commission's administration of the Communications Act.

The view of the United States is that the decision of the Court of Appeals is correct. It is, of course, clear

under the decisions in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, and successor cases that, under a statute which gives standing to those "interested," "aggrieved" or "adversely affected," a person may qualify even though his legal rights, in a strict sense, would not be violated by contemplated administrative action. Under such enactments, the ordinary test for determining whether a would-be intervenor has standing is a common-sense one: Whether, as a practical matter, he has a real and substantial, rather than a frivolous or insignificant, basis for asserting that his interests would be harmed by the proposed agency action. See, generally, Davis, *Standing to Challenge Governmental Action*, 39 Minn. L. Rev. 353 (1955). The Court of Appeals subscribed to that standard (Pet. 5a). Moreover, we believe that its application of the standard to the particular facts of this case cannot be said to be unreasonable.

The trend of decisions has been to give a reasonably liberal construction to phrases such as "parties in interest" and "persons aggrieved or affected" when used in statutes which confer standing to participate in administrative proceedings and to seek review of administrative orders. See, *e. g.*, *United States ex rel. Chapman* v. *Federal Power Commission*, 345 U. S. 153; *Reade* v. *Ewing*, 205 F. 2d 630 (C. A. 2); *National Coal Ass'n* v. *Federal Power Commission*, 191 F. 2d 462 (C.A.D.C.); *Associated Industries* v. *Ickes*, 134 F. 2d 694 (C. A. 2). Since the Federal Communications Commission, in the absence of objection, may take final administrative action au-

thorizing construction of a broadcasting facility without conducting a hearing, hospitable consideration of a claim of standing serves the public interest, in our view, because it enables the agency and the reviewing court to consider and weigh substantial factual or legal objections which otherwise might not be presented and developed.* This is not, of

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* Under the Radio Act of 1927, the immediate predecessor of the Communications Act of 1934, the right of appeal in licensing cases was originally restricted to unsuccessful applicants and to licensees whose authority was ordered revoked. Section 16, 44 Stat. 1169. A minority report filed by Congressman Davis of Tennessee (H. Rept. No. 404, 69 Cong., 1st Sess., pp. 6-21) had unsuccessfully urged that appeal rights should be broader and extend to any person "aggrieved." See, also, Congressman Davis' remarks on the floor that appeal rights ought to be granted to any person "interested in, aggrieved, or in any way affected or inconvenienced by" any licensing decision. 67 Cong. Rec. 5485.

In 1930, Section 16 was amended (46 Stat. 811) to give a right of review in licensing cases to any applicant, any licensee, or "any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the commission * * *." Congressman Davis, who was one of the managers of the House bill incorporating this amendment, stated that the 1927 provision had not proved sufficiently "comprehensive"; that the new bill aimed to "insure any interested party the right to be heard"; and that the new bill expressed the views which he had urged several years previously when the same issue of standing had been before the 69th Congress. 72 Cong. Rec. 8052, 11530. Without material change, Section 16 of the Radio Act, as amended in 1930, became Section 402(b) of the Communications Act of 1934 (the section which came before this Court in the *Sanders* case).

In changing protest procedures in 1952 (see Section 309 (c), 47 U. S. C. 309(c)), Congress, it seems clear, intended to leave the law of standing unchanged. It indicated that

course, to say—and the Court of Appeals does not suggest—that an interest which is merely "remote and insubstantial" (*National Broadcasting Corporation* v. *Federal Communications Commission*, 132 F. 2d 545, 548 (C.A. D.C.), affirmed, 319 U. S. 239), would suffice to confer standing. The question of standing thus depends, in final analysis, upon an evaluation of the particular facts.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

DECEMBER 1958

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the courts would draw the line, as they had in the past, in determining when one who claimed an interest had a "legitimate interest." S. Rept. No. 11, 82d Cong., 1st Sess., p. 8.

STATEMENT OF THE FEDERAL COMMUNICATIONS COMMISSION

The holding of the Court of Appeals (Pet. App. A) that, where a Commission broadcast licensee uses licensed facilities to provide various kinds of "advertising" for another business in which its parent corporation is engaged, any competitor of the parent corporation has standing to protest the renewal of the relevant license under Section 309(c) of the Communications Act (47 U.S.C. §309(c)) and to appeal any adverse determination of that protest under Section 402(b)(6) of the Act (47 U.S.C. §402(b)(6)), raises problems of concern to the Commission. This memorandum sets forth the Commission's views on the serious jurisdictional problem involved and on the practical difficulties which confront the Commission in its administration of the Communications Act as a result of the Court of Appeals' interpretation of the statute.

Both in its decision dismissing the Philco Corporation's protest of the renewal of the National Broadcasting Company's licenses to operate a radio and a television broadcast station in Philadelphia and in the court below the Commission took the position that no likelihood of substantial injury to Philco as a result of the renewal had been shown and that standing to protest or to appeal was therefore absent. The alleged injury flowing from various network activities of the National Broadcasting Company (NBC) (upon which the majority in the Court of Appeals did not pass) was, in the Commission's view, wholly irrelevant to the license renewal which Philco protested.

The injury allegedly resulting from those NBC station activities which provide some "advertising" for its parent corporation, the Radio Corporation of America (RCA), was, the Commission thought, too vague and insubstantial to form a basis for standing. If this case involved nothing more than a difference in judgment on certain unique factual details between the majority of the court below and the Commission, there might be little cause for concern. The problem, however, goes much deeper.

A "party in interest" under Section 309(c) of the Act has substantial procedural rights. Where the Commission grants any authorization without hearing, such a party may force the holding of a hearing if he alleges with particularity facts which, if true, show that the grant was improperly made or would otherwise not be in the public interest. The hearing and determination of any such case must be expedited, and the effectiveness of the grant involved must be postponed, pending hearing and decision, unless the authorization is necessary to the maintenance of an existing service or the Commission affirmatively finds, for reasons set forth in its decision, that the public interest "requires" that the grant remain in effect.

The very significant procedural role which such parties in interest are thus authorized to play in the Commission's administration of its licensing functions under the Communications Act must be obvious. Section 309(c), moreover, introduces the concept of the "private attorney general," which originally appeared in the field of appellate review of ad-

ministrative decisions, into the heart of the administrative process, and the facts which confer standing to enact that role upon any person need bear no relationship to the merits of the Commission action which he is empowered to affect so substantially. Indiscriminate extension of standing to force a hearing under Section 309(c) can thus have a grave effect upon the Commission's ability to control its docket and allocate its energies and attention to the problems whose merits are most deserving. Cf. *Federal Communications Commission* v. *WJR, The Goodwill Station*, 337 U.S. 265, 282-283.

Clearly Congress did not contemplate an unlimited class of "private attorneys general" insofar as the protest procedure was concerned. When Section 309 (c) was enacted, the Senate Report on the relevant bill stated (S. Rept. No. 44, 82nd Cong., 1st Sess., p. 8):

> Fear has been expressed that use of 'parties in interest' might make possible intervention into proceedings by a host of parties who have no legitimate interest but solely with the purpose of delaying license grants which properly should be made. The committee does not so construe the term 'party in interest'; 'parties in interest' because of electrical interference are fixed and defined by the Supreme Court decision in the

Federal Communications Commission v. *Sanders Radio Station*, 309 U.S. 470; *Associated Industries* v. [illegible], 131 F.2d 691 (C.A. 2), vacated as moot, 320 U.S. 707.

Scripps Howard Radio v. *Federal Communications Commission*, 316 U.S. 4, 14.

> KOA case (319 U.S. 239) and the Commission's rules and regulations; 'parties in interest' from an economic standpoint are defined by the Supreme Court decision in the Sanders case (309 U.S. 470).

Standing under the *KOA* case (*Federal Communications Commission v. National Broadcasting Co. (KOA)*, 319 U.S. 239) is clearly limited to those who hold licenses from the Commission and whose radio signal suffers interference within the contours protected under the Commission's rules as a result of a Commission order authorizing another radio operation. The *Sanders* decision (*Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470), on the other hand, presents an instance in which a broadcast licensee was held to have standing to appeal from a Commission order authorizing the entry of a new competing station in the same market, because of the likelihood that the licensee of the existing station would be financially injured by the new competition.

Various lower courts have read the *Sanders* decision as conferring standing to appeal, under ordinary statutory provisions, wherever there is a likelihood of some injury as a result of the administrative action of which review is sought. See, *e.g.*, *Associated Industries* v. *Ickes*, 134 F.2d 694 (C.A. 2), *vacated as moot*, 320 U.S. 707; *Reade v. Ewing*, 205 F.2d 630 (C.A. 2); *Metropolitan Television Co.* v. *Federal Communications Commission*, 221 F.2d 879. See also Davis, *Standing to Challenge Governmental Action*, 39 Minn. L. Rev. 353 (1955). On the other hand, the re-

quirement, suggested by Judge (later Justice) Rutledge, that " * * * there be probable injury of a substantial character" (*National Broadcasting Corporation (KOA)* v. *Federal Communications Commission*, (C.A. D.C.), 132 F.2d 545, 548, *affirmed*, 319 U.S. 239) is generally accepted, as is the requirement that " * * * the class of petitioners who have 'standing to sue' be confined to those who can show some direct adverse effect traceable with reasonable certainty to the regulations promulgated." *United States Cane Sugar Refiners' Ass'n* v. *McNutt*, 138 F.2d 116, 120 (C.A. 2). And Justice Douglas, dissenting in *Federal Communications Commission* v. *National Broadcasting Co. (KOA)*, *supra*, 319 U.S. 239, 265, has argued that unless standing to appeal is limited to those whose interest in the administrative matter involved is substantial and immediate the constitutional requirement of case or controversy will be violated.

Whatever the limitations which should be imposed upon standing to appeal, however, the Senate Report quoted above makes it clear that Congress conceived of standing to protest under Section 309(c), upon grounds of economic injury, as limited to cases where the likelihood of substantial injury due to Commission action was at least as clear, obvious and substantially incontestable as it was in the *Sanders* case. If there were any doubt that Congress intended standing to protest based on allegations of economic injury to be limited to cases of obvious and largely incontestable likelihood of such injury, that doubt would be resolved, in the Commission's view, by the fact

that Section 309(c) makes the question of whether one who protests a Commission grant is properly a "party in interest" a threshold issue, which the Commission must normally, and perhaps always, determine within thirty days of the filing of the protest on the basis of pleadings.[3] Since no substantial purpose could be served by long and complex hearings upon an issue which need bear no relation to the merits of any Commission action, this provision of the statute is easily understandable. Its effect, however, is to rule out, at least as a matter of normal practice, claims of standing as a "private attorney general" which rest on allegations of injury, the likelihood and substantiality of which cannot be demonstrated on the pleadings.[4] Clearly the statute is

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[3] "Any protest so filed * * * shall contain such allegations of fact as will show the protestant to be a party in interest. * * * The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant * * *." Communications Act, Section 309(c), as amended. It is conceivable, though in the Commission's view unlikely, that this language might allow a preliminary hearing upon standing issues alone in certain exceptional cases. It is clear that the section does not contemplate such hearings as a normal practice.

[4] It is to be noted that such reasoning would not apply to a case where standing is claimed, not as a "private attorney general", but rather on grounds which are identical with the reasons urged for setting aside the grant on the merits. In such a case, the statute clearly contemplates the designation of such issues for hearing. Cf., *Granik* v. *Federal Communications Commission*, 234 F.2d 682.

designed, insofar as this aspect of the protest procedure is concerned, to avoid the necessity for judgments based upon conjecture or surmise.

The holding of the court below, however, was necessarily based on just such a judgment.[5] Without attempting to delineate all the situations in which the probability of substantial injury as a result of Commission action would be so demonstrable as to support a claim of standing, it is clear that beyond the sphere of the particular industry regulated and its competitors, consumers and suppliers,[6] the effects of any Commission action become increasingly difficult to predict. Here, for example, it is indisputable that RCA benefits in a general sense from NBC's ownership of broadcast stations, because of the profits which those stations earn. It is possible that whatever helps RCA may hurt its competitors. Surely this contingency alone, however, would not suffice

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[5] "Here the likelihood of substantial injury to Philco due to the competitive advertising advantages secured by RCA," stated the majority, "seems to us about as real as the circumstances held to give standing in *National Coal Ass'n* v. *FPC* * * *, and *Reade* v. *Ewing*. * * *" (Pet. 5a).

[6] "The Commission has found, with judicial approval, that the sole newspaper publishers in a community does have standing, upon a sufficient factual showing concerning the impact of television upon the advertising market in which both broadcast stations and newspapers operate, to protest the grant of construction permit for a first television service in the same community. *Ohio Valley Broadcasting Corp.*, 10 Pike & Fischer, Radio Regulation 152, affirmed on this point *sub nom. Clarksburg Publishing Co.* v. *Federal Communications Commission*, 225 F.2d 511.

to confer standing to protest every NBC license renewal upon an entire industry not licensed by the Commission and without any stake in Commission action except insofar as that action is in some general sense a boon to one of their competitors.[7]

Apparently recognizing these considerations, the majority below did not attempt to place its holding on the simple ground that NBC's profits, made possible by operation under Commission licenses, help RCA and therefore may hurt RCA's competitors. Nor did it purport to find that such NBC practices as the incorporation of the RCA trade mark into station call letters and the announcement, at station breaks, that the station is "a service of RCA" substantially injure Philco simply because they are intended to, and presumably do, benefit RCA to some extent and in a general sense. The essence of the majority's holding lies in its statement that NBC's use of licensed facilities confers upon RCA " * * * a preferential economic advantage over the protestant." (Pet. 6a)

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[7] Cf., "It is inevitable that such regulations as these will affect in one way or another a large number of persons. In a sense they 'affect' the public at large for whose benefit they are promulgated. It is to be expected that this effect may be thought to be 'adverse' by a lesser, but still large, number of persons not engaged in making or selling the standardized product. It is, however, inconceivable that Congress intended to permit all persons who could show a remote and uncertain likelihood that the regulations would injuriously affect the market for their produce to file petitions to review merely because they decided that they had been, or might possibly be, put in danger of that." *United States Cane Sugar Refiners' Ass'n* v. *McNutt*, 138 F.2d 116, 120 (C.A. 2)

The picture which called up by this language is that of a manufactu who corners a uniquely valuable source of supply or who obtains some other kind of substantial leverage upon his competitors. The basis for the court's conclusion that NBC's advertising of RCA falls into th category, however, is nowhere set forth in the opir on. There is no reason to assume, moreover, that uch advertising as is inherent in the NBC prac ices involved in this case is any better or more effective than any other kind of advertising, broadcast or otherwise, which is available to Philco. Moreover, as the dissenting judge pointed out (Pet. 7a), to the extent that NBC uses broadcast time to advertise RCA it sacrifices the opportunity to sell that time to another advertiser. To the extent that no immediate sacrifice of revenue is required, *e.g.*, by the incorporation of the RCA trade mark into a station's call letters, it is nonetheless true that such benefits cannot and do not come to RCA without a substantial investment of funds in the NBC stations which might well be used to achieve the same effects in another manner. The Commission's renewal of NBC's Philadelphia licenses places no artificial barrier in the way of Philco's investing its funds to obtain broadcast stations and thereafter using them in precisely the same manner as NBC uses its stations. The very television station involved in this case was owned by Philco from 1943 to 1953, and during that period Philco employed similar means to identify the station in the public mind as a Philco enterprise.

In sum, while the Commission is willing to assume that the NBC practices involved in this case may have some undetermined and indeterminable effect upon competition between RCA and Philco, it does not believe that a probability of substantial injury to Philco has been or can be demonstrated, without indulging in the most speculative judgments. Certainly where the "private attorney general" role under Section 309(e) is sought, in effect, for entire industries not subject to the Commission's regulatory control, some more substantial interest must be shown.

As petitioner has pointed out, a substantial number of Commission licensees engage in other non-licensed businesses or are under common control with firms in other industries (Pet. 10-11), and the practices of NBC which are at the root of this case are not unique or uncommon (Pet. 4, fn. 3; see also the motion and brief filed on behalf of the Gerity Broadcasting Company, pp. 1-2). The number of potential "private attorneys general" which the decision below creates at one stroke is substantial, to say the least. If the question raised related to the merits of Commission action, it might well be argued that the burdens involved in making relief available to so many parties were of less significance than the policies the statute is designed to implement. The issue, however, relates only to the selection, pursuant to Congressional mandate, of those eligible for a privileged and significant status in the administration of the Act. Thus, in the Commission's view, the holding of the court below misconceives the statutory

scheme and creates a precedent which can have a disruptive impact upon the Commission's administration of that scheme.

Respectfully submitted,

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DECEMBER, 1958

U. S. GOVERNMENT PRINTING OFFICE 1958

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Office-Supreme Court, U.S.
FILED
JAN 9 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 371

NATIONAL BROADCASTING COMPANY, INC., *Petitioner*

v.

PHILCO CORPORATION, *Respondent*

RESPONSE OF THE RESPONDENT TO MEMORANDUM FOR THE UNITED STATES

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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October Term, 1958

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RESPONSE OF THE RESPONDENT TO MEMORANDUM FOR THE UNITED STATES

The Statement of the Federal Communications Commission is largely confined to two basic concepts. The first is that the decision below is incorrect and the second is that the decision "can thus have a grave effect upon the Commission's ability to control its docket and allocate its energies and attentions to the problems whose merits are most deserving."[1] Neither of these contentions is correct.

The soundness of the decision below we believe to be amply demonstrated in the Memorandum for the

[1] Statement of the Federal Communications Commission at p. 7 of Memorandum for the United States, National Broadcasting Company, Inc. v. Philco Corporation, No. 371.

United States and in respondent's brief. Nor do we believe that this case calls upon the Commission to allocate its energies and attention to problems whose merits are not "most deserving."

The protest filed by the respondent with the Federal Communications Commission alleges that RCA and NBC have pursued a consistent course toward monopoly since their creation. Set forth therein is pending litigation involving RCA-NBC from 1946 through 1957, all alleging illegal conduct. The protest showed that the propriety of current practices of RCA-NBC has been seriously questioned in two reports issued from Congressional sources.[2]

The seriousness of the problems involved in the activities set forth in the Philco protest is emphasized by the fact that since the protest was filed: (1) RCA has been indicted, convicted, and fined for violating the criminal provisions of the antitrust laws;[3] (2) a private action against RCA for alleged violations of the antitrust laws has just recently been settled by RCA paying the plaintiff a very substantial sum of money;[4] (3) a consent decree has been entered in a civil suit brought by the Government against RCA and directed at RCA's patent abuses in the communications field.[5]

[2] *The Television Broadcasting Industry*, H.R. Rep. No. 604, 85th Cong., 1st Sess. (1957). *The Television Inquiry*, Senate Report, Committee Print No. 2, Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess. (1957).

[3] United States v. Radio Corporation of America, Criminal Action No. 155-107 (U.S.D.C.S.D.N.Y. 1958).

[4] Zenith Radio Corporation v. Radio Corporation of America, C.A. No. 1247, filed Aug. 9, 1949, U.S.D.C. Del.

[5] United States v. Radio Corporation of America, C.A. No. 97-38, filed March 15, 1957, U.S.D.C.S.D.N.Y.

(4) RCA has been named as a co-conspirator (but not a defendant) in an antitrust suit brought by the United States, charging that the defendants engaged with other co-conspirators to restrain foreign trade and commerce between the United States and Canada in radio and television receiving sets.[6] The effect of these activities on RCA competitors, such as Philco, was described by the Assistant Attorney General with reference to the criminal suit as follows:

> "When business practices inhibit the normal operation of an industry essential to our civilian economy and defense program, and deter the competitive expansion of scientific research in the increasingly important area of electronics, as alleged in this case, they become a threat not only to our system of free enterprise but also to our national security. The practices charged to have been employed by the defendant were allegedly consciously adopted and are of long-standing duration.
>
> * * *
>
> ". . . By this criminal action we seek to restore competition in this significant industry so that all competitors of RCA can compete with it at every level from the research laboratory to the sale of end products."[7]

Both before the filing of the Philco protest, and after its dismissal by the Commission, as to parties other than RCA-NBC, the Commission has insisted that conduct involving possible violation of the antitrust or other laws warrants a hearing as to the party's fitness

[6] United States v. General Electric Company, Westinghouse Electric Corporation, and N. V. Philips' Gloeilampenfabrieken, C.A. No. 140-157, filed Nov. 24, 1958.

[7] U. S. Department of Justice, Press Release, February 21, 1958.

to be a licensee.[8] This view was restated by the Commission as recently as December 4, 1958, in its Decision in *Connecticut Water Company*, Docket No. 12323-24. In denying a license it stated:

> "On the contrary, the Commission, in its general public interest determinations, has an obligation to consider any relevant anti-trust matters. *National Broadcasting Company* v. *United States*, 319 U.S. 190."

This inconsistency as to RCA-NBC can hardly be justified by the Commission as necessary to preserve control of its docket.

In these circumstances it is respectfully submitted that the decision below is not only correct in law but that a contrary result would have been inimical to the public interest which, in the last analysis, must rise.

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[8] See Bulova and Henshel (Mester), 3 Pike & Fischer RR 125 (1946), *aff'd sub nom.* Mester v. United States, 70 F. Supp. 118 (E.D.N.Y.), *aff'd per curiam*, 332 U.S. 749 (1947); Mansfield Journal Co. v. Federal Communications Commission, 86 U.S. App. D.C 102, 180 F. 2d 33 (1950) and the decision of the Commission in Page Boy, Inc., 8 Pike & Fischer RR 1108 (1954), *aff'd per curiam sub nom.* Klein v. Federal Communications Commission, 98 U.S. App. D.C. 73, 232 F. 2d 73 (1956), for the Commission's interpretation of its authority prior to the Philco protest.

Since the Philco protest the Commission has again considered the qualifications of the Mansfield Journal Co. and has concluded that a substantial question still exists as to whether the Mansfield Journal Co. engages in and will continue to engage "in business practices tending toward the suppression of competition and the attainment of a monopoly in advertising and news dissemination." In spite of Mansfield's claim that it has undergone a 100% change in ownership and management, the Commission has indicated that a hearing on its qualifications is necessary in the light of its past history. See letter from the Secretary of the Federal Communications Commission to Mansfield Journal Co., issued under FCC File No. 65823.

above considerations of alleged administrative inconvenience.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
OCT 16 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 371

NATIONAL BROADCASTING COMPANY, INC., *Petitioner,*

v.

PHILCO CORPORATION, *Respondent.*

OBJECTION OF RESPONDENT TO MOTION BY GERITY BROADCASTING COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Gerity Broadcasting Company, the owner of a television station affiliated with the petitioner for certiorari, NBC, has moved for leave to file brief amicus curiae in support of petition for a writ of certiorari. Rule 42 of the Rules of this Court requires that such a motion shall "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties." Gerity makes no attempt to state any facts or questions of law that have not been presented by the parties, nor does

it submit any reasons for believing that the issues of this case will not be adequately presented by the parties.

WHEREFORE, the motion should be denied.

Respectfully submitted,

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October 16, 1958

FILE COPY

IN THE

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OCTOBER TERM, 1958.

No. 371

NATIONAL BROADCASTING COMPANY, INC., *Petitioner*,

v.

PHILCO CORPORATION, *Respondent*.

MOTION BY GERITY BROADCASTING COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

BRIEF OF GERITY BROADCASTING COMPANY, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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October 10, 1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 371

NATIONAL BROADCASTING COMPANY, INC., *Petitioner*,

v.

PHILCO CORPORATION, *Respondent*.

MOTION BY GERITY BROADCASTING COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Gerity Broadcasting Company requests the Court to grant it permission to file a Brief Amicus Curiae in support of the Petition of National Broadcasting Company for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Gerity Broadcasting Company is the licensee of Television Station WNEM-TV in Bay City, Michigan, and of AM Station WABJ in Adrian, Michigan. It has no other business interests. However, James Gerity, Jr., the sole stockholder of Gerity Broadcast-

ing Company, has extensive business interests in the non-broadcast field. In particular, he is a stockholder and director of Hammond-Standish Company, a meat packing company in Michigan, and he is also a stockholder and director of the Commercial Savings Bank of Adrain, Michigan. Both of these companies utilize the facilities of WNEM-TV or WABJ for the purpose of advertising and promoting those companies. The meat packing company and the bank are in competition with other companies within the service area of WNEM-TV and WABJ.

Gerity Broadcasting Company is interested in the instant proceeding because the opinion of the Court below holds that a company which is not in any way directly or indirectly engaged in the broadcasting business, has standing to file a Protest against the grant by the Federal Communications Commission of an application for renewal of licenise of a broadcast station simply because the would-be Protestant is engaged in the business of manufacturing and selling products which are competitive with similar products manufactured and sold by the parent company of the broadcast licensee.

To understand the basis of our concern, a brief description of Federal Communications Commission procedure should be useful. Under the Communications Act of 1934, as amended, radio broadcast equipment may not be utilized for broadcast purposes without a license therefor granted by the Commission pursuant to a written application filed by the applicant. Once an application is granted, any change in equipment used or in the location of the antenna requires another application. In addition, applications for re-

newal of license must be filed at least every three years and at times at more frequent intervals.

Under Section 309(c) of the Communications Act, a Protest may be filed against a grant of any of the above applications. When a Protest is filed by a qualified person, the Commission must either set same for oral argument or designate it for evidentiary hearing. The great majority of Protests require an evidentiary hearing. Although Section 309(c) provides that hearings on Protests shall be expedited, the numerous procedural steps[1] that must be taken by the Commission and the crowded condition of the Commission's docket make it extremely unlikely that a final decision on a Protest case can be rendered in less than a year or a year and a half.

As the licensee of broadcast stations, Gerity Broadcasting Company is keenly aware of the harassment and opportunities for delay which Section 309(c) con-

[1] These steps are as follows:

1. A Protest may be filed within 30 days of the grant of an application without a hearing.
2. The Commission must act on the Protest within 30 days of filing.
3. A hearing is held before an Examiner.
4. The parties are permitted to file Proposed Findings with the Examiner.
5. The Examiner issues an Initial Decision.
6. The Parties are permitted to file Exceptions to the Initial Decision.
7. Oral Argument must be heard by the Commission en banc at the request of any party.
8. The Commission issues a Final Decision.
9. A Petition for Rehearing may be filed by any party within 30 days.
10. The Commission must issue a written opinion disposing of the Petition for Rehearing.

fers upon its competitors. Several of its applications have been grievously delayed by the filing of such Protests, to the detriment of its service to the public. Thus far, however, these Protests have been filed by licensees of broadcast stations. If the opinion of the Court below is permitted to stand, the opportunity for harassment or delay will be extended to any of Mr. Gerity's competitors in the non-broadcast field. We submit that this result could not have been intended by Congress.

Gerity Broadcasting Company requests the opportunity to file a Brief Amicus in this proceeding because the deleterious effect of the principles announced by the Court below affect not only the National Broadcasting Company but also Gerity Broadcasting Company and other licensees similarly situated. We therefore respectfully request that the Court accept the attached Brief Amicus Curiae.

Respectfully submitted,

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October 10, 1958

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NATIONAL BROADCASTING COMPANY, INC., *Petitioner*,

v.

PHILCO CORPORATION, *Respondent*.

BRIEF OF GERITY BROADCASTING COMPANY, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST OF AMICUS CURIAE

Gerity Broadcasting Company is the licensee of Television Station WNEM-TV, Bay City, Michigan and of AM Station WABJ, Adrain, Michigan. Its sole stockholder is James Gerity, Jr., who has extensive non-broadcast interests. Some of the non-broadcast companies in which he has an interest utilize the facilities of WNEM-TV and WABJ for the purpose of advertising and promoting the companies. As we read the opinion of the Court below in the instant case, non-broadcast companies which are competitive with those non-broadcast companies in which Mr. Gerity has

an interest, have standing to file Protests against action of the Commission granting applications of Gerity Broadcasting Company for renewal of license and probably other types of applications. Gerity Broadcasting Company has been hampered in the past in its efforts to provide maximum service to the public its stations serve because of the delays in obtaining authorizations caused by the filing of Protests by licensees of competitive broadcast stations. If the opinion of the Court below is permitted to stand, the doors will be opened wide to an indeterminate number of persons who will be given an opportunity to harass the broadcast operations of Gerity Broadcasting Company—and of other companies similarly situated—in order to protect competitive positions in industries having no relation to broadcasting. We believe that the opinion of the Court below sanctioning such a result is wrong and should be set aside by this Court.

ARGUMENT

The instant case involves a Protest by the Philco Corporation against the action of the Federal Communications Commission in granting the application of National Broadcasting Company for renewal of the station license of Television Station WRCV in Philadelphia. Philco filed its Protest under Section 309(c) of the Communications Act of 1934, as amended, asserting *inter alia* that it was a "party in interest" within the meaning of that Section by virtue of the fact that it is a manufacturer competing with RCA (the parent company of NBC) in the sale of its products.[1] The

[1] Philco also relied upon its status as an advertiser on television facilities as an additional ground upon which to base its standing. The Court below did not feel it necessary to rule upon this claim as a basis for standing.

Commission dismissed the Philco Protest holding that it was not a party in interest. The Court below, with Judge Madden dissenting, held that Philco was a party in interest and remanded the case to the Commission to consider the Protests on the merits.

At the outset, it should be pointed out that Philco in complaining of the Commission's action granting the WRCV renewal is not seeking to protect or vindicate any rights or privileges personal to it. If it is permitted to participate in the hearing, the Commission will not be called upon to consider the nature of the injury which Philco is allegedly suffering from the competitive efforts of RCA. Rather, the subject matter of the hearing will be confined to questions of whether NBC is qualified to operate WRCV and whether a grant of the WRCV renewal would serve public interest, convenience, or necessity. So far as the usual concepts of "case or controversy" are concerned, Philco's interest in these matters is the same as that of any private citizen. Absent statutory provisions conferring a special status upon it—that of a private attorney general—its appeal in this case must fail for want of "case or controversy".

Philco claims that it does have a special status conferred upon it by Section 309(c) of the Communications Act of 1934, as amended. That Section was first introduced into the Communications Act in 1952.[2] It provides that an application which is granted without a hearing by the Commission shall remain subject to protest for a 30-day period. Within that period any "party in interest" is permitted to file a Protest

[2] Public Law No. 554 (82nd Cong.) 66 Stat. 715; amended by Public Law No. 391 (84th Cong.), 70 Stat. 3.

against such grant. If the Protest meets certain qualifications, the Commission is required to order a hearing on the application.[3]

The adoption by Congress of Section 309(c) was over the vigorous objections of the Commission. It feared that the term "party in interest" was so broad that it would permit a host of parties with no legitimate interest to hamstring the Commission's processes. The Congress, while desirous of having the Protest provision in the Act, was anxious to restrict the use of the provision to those with legitimate interest. To accomplish this result, it confined the term "party in interest", to the interpretation of somewhat similar language in the Communications Act which had heretofore been adopted by two Supreme Court opinions. The Report of the Senate Committee on Interstate and Foreign Commerce accompanying the bill makes this clear. It reads as follows (S. Rep. No. 44, 82nd Cong., 1st Sess. at p. 8):

> "Fear has been expressed that use of 'parties in interest' might make possible intervention into proceedings by a host of parties who have no legitimate interest but solely with the purpose of delaying license grants which properly should be made. The Committee does not so construe the term 'party in interest;' 'parties in interest' because of electrical interference are fixed and defined by the Supreme Court decision in the KOA case (319 U.S. 239) and the Commission's rules and regulations; 'parties in interest' from an economic standpoint are defined by the Supreme Court decision in the Sanders Case (309 U.S. 470)."

[3] Under certain conditions, the effectiveness of the grant must be suspended pending the outcome of the hearing. This latter requirement does not apply to renewals.

This quotation makes it clear that only two classes of private attorneys general are comprehended by the phrase "parties in interest". The first class is easily defined. It comprehends existing radio stations which would suffer electrical interference to their protected operations as defined by the Commission's Rules and Regulations. In the *KOA* case (*Federal Communications Commission* v. *National Broadcasting Co.* (KOA), 319 U.S. 239) this Court held that a station's license incorporates therein all of the Commission's Rules and Regulations relating to the station's normally protected service area and interference thereto. Therefore, any new application which would cause interference to such operation is a modification of the station's license and entitles the licensee to intervene in any hearing held on the application proposing to cause the interference.

The second category (*Federal Communications Commisison* v. *Sanders Bros. Radio Station*, 309 U.S. 470) is not so precisely defined as the first one. The *Sanders* case involved a hearing ordered by the Commission on an application for a new station. An existing station in the same market alleging that the grant of the new station would cause economic injury to it, was permitted to participate in the hearing. When the new application was granted, the existing station appealed. The Commission contended that the appellant had no standing to file its appeal since the basis of the appellant's cause of action was injury from competition, and—according to the Commission's argument—the Communications Act did not protect existing stations against competiton. This Court agreed with the Commission that an existing station is not entitled to protection against competition. However,

it disagreed with the Commission on the question of standing, holding that the existing station had standing—under the provision of Section 402(b)(2) of the Act conferring standing upon persons "aggrieved or whose interests are adversely affected" by Commission action—to appeal to the Court for the purpose of calling its attention to any errors of law committed by the Commission in making the grant. The Court disagreed with the Commission's contention that the appellant's standing was inconsistent with the constitutional requirement of "case or controversy," holding, in effect, that the quoted provision of Section 402(b)(2) resulted in creating a new class of litigant, private attorneys general, who were thus enabled to bring to the Court's attention errors of law committed by the Commission in granting applications.

Although *Sanders* appears to be a relaxation of the strict requirements of case and controversy, there is no reason to believe that the Court opened the doors wide for any meddler to inject himself into Commission proceedings. The role of private attorney general is not given to meddlers. Of necessity, it must be restricted to those with a legitimate interest in the action of the Commission. The Senate Committee said so in so many words (See p. 4, *supra*). There is every reason in logic and policy to hold that only persons holding licenses from the Commission can qualify as having legitimate interest as private attorneys general.

It should be remembered that Section 309(e) of the Communications Act is part and parcel of a statutory scheme relating to the operation of radio stations. The Commission is required to grant applications for radio stations only if they will serve public interest, conven-

ience or necessity. Licensees of radio stations are engaged in a private business, but it is a private business which obligates them to operate in the public interest. Since licensees have the obligation to operate in the public interest, they have a legitimate interest in any action of the Commission granting applications to stations, if such action has any bearing upon their continued ability to operate in the public interest. The two cases cited in the Senate Report fall into this category. In the *KOA* case this Court held that licensees have standing to intervene in proceedings on applications for new stations involving interference to existing stations. The basis for this holding is that the purpose of the Act is to incorporate into the license the provisions of the Commission's Rules and Regulations relating to service contours and interference. Hence, a licensee has the right to protect that service area and his obligation to serve the interests of the public residing in such area. The *Sanders* case states that even though a station licensee must operate in a free competitive market, he is privileged to resist the grant of new applications which would affect the economics of his operation when he can show that the grant of the new application is against the public interest or would prevent the existing station from operating in the public interest. An existing station in this type of situation is not a mere volunteer. Being engaged in a business which must serve the public interest, he is protecting that status when he objects to the grant of a new application. His participation is related to the public interest and is an integral part of the scheme of the Communications Act designed to see to it that broadcasting is carried on in the interest of the public.

We do not mean that the right to file a Protest under Section 309(e) is limited under all circumstances to licensees of radio stations. What we do contend is that this limitation is required when the person seeking to employ Section 309(e) is not seeking to protect a legal right personal to him, but instead claims status as a private attorney general. Where the Protestant is seeking to protect his own legal rights, traditional concepts of "case or controversy" are present and are effective guarantees that only those with a legitimate interest will participate in Commission proceedings. It is not necessary or appropriate to catalogue all types of cases which might fall into this category. Suffice it to point out that action of the Commission in granting an application on condition that the applicant abrogate an existing contract with the Protestant would, under well-recognized concepts, entitle the Protestant to invoke the aid of a court to protect his rights against improper interference by the Commission.[4] Similarly, action of the Commission granting an application for transfer of license to a third person, when the would-be Protestant urges that the licensee is under a contractual obligation to transfer the station to him, would be an appropriate occasion for a Protest since the Commission's action would adversely affect or interfere with the contractual rights of the Protestant.[5] Other instances could be cited but they would be merely cumulative examples of the basic principle.

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[4] Cf. *Columbia Broadcasting System* v. *United States*, 316 U.S. 407. Cf. also *Regents of Georgia* v. *Carroll*, 338 U.S. 586.

[5] *Granik* v. *Federal Communications Commission*, 234 F. 2d 682 (App. D.C. 1956).

Philco does not fit any category of "party in interest" which has been discussed. It does not assert any rights which have been violated by the Commission. It does not allege that the Commission's action constitutes an improper interference with contractual relations or property rights of Philco. It cannot qualify as a private attorney general because the Commission's action in no way has any bearing upon its ability to continue operating in the public interest. Its interest is no different from that of any other private citizen. To hold that it has standing in this case would open the door for interference in Commission processes by a host of persons with no legitimate interest in this public-service industry. To do so would be inconsistent with the Congressional purpose in enacting Section 309(e).

CONCLUSION

For the foregoing reasons, it is requested that the Petition For Writ of Certiorari be granted.

Respectfully submitted,

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October 10, 1958

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OCT 24 1958
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 371

NATIONAL BROADCASTING COMPANY, INC.,

Petitioner,

v.

PHILCO CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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October 23, 1958

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REPLY BRIEF FOR PETITIONER

The theme of respondent's opposition, which is repeated throughout its argument, is that the decision below was a routine "application of the well-established legal test regarding standing".[1] Respondent stands alone in urging this view. Even the majority of the court below recognized that its decision is unprecedented. Judge Fahy's opinion states that whether or not respondent has standing is a question which "has not before arisen in the present context. Drawing the 'party in interest' line is a difficult process." Petition, pp. 4a-5a, R. 98-99. The dissenting opinion characterized the result below as "completely unjustified" (Petition, p. 6a, R. 100), and the Federal Communications Commission held that granting Philco standing "would make a mockery of the concept of 'party in interest'" (Petition, p. 13b, R. 86-87).

[1] Respondent's Brief in Opposition, hereafter abbreviated "Res. Br.", p. 6.

Respondent's assertion that the question here presented "has been authoritatively settled by this Court" (Res. Br., p. 7) is also in error. The only decision of this Court cited in respondent's brief is *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, decided a dozen years before the protest section was enacted in 1952. There, the Commission permitted the owner of an existing station to intervene as a party in the proceedings before it, but contended that the station owner was not entitled to appeal the resulting order. This Court's holding that the station owner was a "person aggrieved" by the issuance of a permit to construct a new station to serve the same area (an "aggrievement" so serious that it might have deprived the public of an existing broadcast service) is obviously not authority for the decision below, as the majority itself recognized (Petition, pp. 4a-5a, R. 98-99).

Neither *Sanders* nor any of the lower court cases cited by respondent have held that one who has no economic or competitive interest in the broadcasting industry may qualify as a "party in interest" entitled to protest or appeal Commission action. Philco admittedly has no such interest, but seems to argue that the nature of its business or "occupation" is irrelevant (Res. Br., p. 8).[2] This, of

[2] This Court has recognized the validity of an "occupational" test for determining standing. See *L. Singer & Sons* v. *Union Pacific Railroad Co.*, 311 U. S. 295, which held that the plaintiffs were not "parties in interest", quoting with approval the following language of the lower court:

> "• • • we think it may safely be said that the proposed extension of defendant's lines may adversely affect the plaintiffs' welfare. We are of the opinion, however, that their complaint discloses that their welfare cannot be directly, but only indirectly and consequentially, affected by the proposed extension. They are not in competition with the defendant. They are not engaged in the transportation business." (p. 301)

course, is the logical result of the decision below—a result which (as we have shown at pages 12 to 15 of the petition) does violence to the "party in interest" concept as previously construed.

Respondent cites four authorities in support of its position (Res. Br., p. 9). These may be dealt with briefly.

City of Pittsburgh v. *Federal Power Commission*, 237 F. 2d 741 (D. C. Cir. 1956), was an appeal from a Federal Power Commission order, in a proceeding to which appellants had been parties, authorizing the abandonment of a natural gas pipeline and the construction of substitute facilities. The City of Pittsburgh claimed appellate status as a consumer of natural gas adversely affected by the order complained of, which would have resulted in increased rates to consumers in a rate-regulated industry. We have already shown that such consumer cases are inapplicable (Petition, pp. 16-17). That discussion need not be repeated here since, in any event, the decision below was not based on any contention that Philco is affected as a consumer. *Reade* v. *Ewing*, 205 F. 2d 630 (2d Cir. 1953), is another consumer case and is inapplicable for similar reasons.

City of Pittsburgh also held that certain barge operators, who transported petroleum products in competition with the applicant, had standing to appeal because the authorization would cause them direct and substantial injury in that competitive business. Since Philco admittedly does not compete in the regulated area here involved, it cannot claim any similar injury and can derive no comfort from this holding.

Clarksburg Publishing Co. v. *Federal Communications Commission*, 225 F. 2d 511 (D. C. Cir. 1955), is another competitor case which has no application here for reasons already stated (Petition, p. 12, footnote 11).

Respondent's only other authority is "*Associated Industries* v. *Ickes*, 134 F. 2d 694", greatly relied on as having "laid to rest" any concern this Court might otherwise have for congested calendars in the Commission and the courts (Res. Br., p. 11). The Second Circuit there held, largely on the basis of its interpretation of this Court's opinion in the *Sanders* case, that a Bituminous Coal Commission order fixing minimum coal prices could be appealed by consumers who were directly and substantially injured thereby.

Respondent fails to mention by citation or otherwise that certiorari was granted in the *Associated Industries* case, at 319 U. S. 739, and that the Second Circuit's order was thereafter vacated by this Court at 320 U. S. 707.[3]

The petition for certiorari filed by the Solicitor General on behalf of the Bituminous Coal Commission is illuminating. The Government urged this Court to review the *Associated Industries* decision primarily because of the number of challenges to agency orders that threatened to clog the administrative process if the Second Circuit's decision were permitted to stand. Secondly, the Government contended that the Second Circuit had misconstrued the *Sanders* decision. Presumably because of concern for these factors, this Court granted certiorari.

Before argument could be had, however, the Bituminous Coal Act, 15 U. S. C. §§828 *et seq.*, expired. The Solicitor General moved that this Court reverse and remand to the Court of Appeals with directions to vacate its judgment and dismiss the appeal as moot. The respondent opposed that motion and cross-moved to dismiss the writ of certi-

[3] The court below was apparently unaware of this, although it relied on the *Associated Industries* case. The majority opinion did not refer to the further proceedings in this Court (Petition, p. 5a, R. 99).

orari as moot and to remand with directions to dismiss the action in the court below without prejudice. Associated Industries contended that the Court of Appeals' order was validly made at a time when the cause was not moot, and that this Court should not make any determination concerning the merits of that order. This Court, in a *per curiam* opinion, rejected respondent's arguments, *vacated* the order of the Second Circuit, and remanded the cause "for such further proceedings as may be appropriate" (329 U. S. 707). No further proceedings are reported.

It is respectfully submitted that the instant case is even more worthy of this Court's review than was *Associated Industries*, where the agency involved was in the process of dissolution and issued orders only on a sporadic basis. The Federal Communications Commission daily deals with applications such as those here involved. Renewal applications must be made every three years by each broadcast licensee for each license he holds. Moreover, because of the public importance of the broadcasting industry, the Commission is under a Congressional mandate to deal with all such applications expeditiously. 47 U. S. C. § 307 (d).

The remainder of respondent's argument consists of little more than the bald assertion that there is no conflict in the Court of Appeals' decisions discussed at pages 11 to 18 of the petition.

Although respondent does attempt to explain away the clear *intra*-circuit conflict shown in the petition (Res. Br., pp. 14-17), it fails to meet the following significant facts concerning the cases sought to be distinguished.

Pittsburgh Radio Supply House v. Federal Communications Commission, 98 F. 2d 303 (D. C. Cir. 1938), dismissed appeals by three existing station owners because their claims of electrical interference were too general, remote or insubstantial. *Mansfield Journal Co. v. Federal Com-*

munications Commission, 173 F. 2d 646 (D. C. Cir. 1949), and *KEAB Broadcasting Co.* v. *Federal Communications Commission*, 177 F. 2d 40 (D. C. Cir. 1949), dismissed appeals by applicants for licenses who at least had inchoate broadcasting interests. In each of these cases the person held to lack appellate standing had some interest in broadcasting, whereas respondent has no such interest, inchoate or otherwise.

WOKO, Inc. v. *Federal Communications Commission*, 109 F. 2d 665 (D. C. Cir. 1939), and similar cases implicitly overruled by the court below are symptomatic of the need for clarification of the "party in interest" concept by this Court.

In *Southwestern Publishing Co.* v. *Federal Communications Commission*, 243 F. 2d 829 (D. C. Cir. 1957), the company described by respondent (Res. Br., p. 17) as the actual party in interest was the wholly-owned subsidiary of the license applicant which was denied standing to appeal. Petitioner submits that, if an applicant for a broadcast license cannot trace its aggrievement through its wholly-owned subsidiary, *a fortiori* Philco cannot trace its alleged injury as a non-broadcaster through RCA to NBC.

Respondent's concluding contention (Res. Br., pp. 17-18) is in fact a recognition that Philco cannot seriously claim to be directly injured by the order it seeks to protest. Respondent argues that it is "splitting hairs" to distinguish between injury resulting from Commission action and injury resulting from a licensee's activities. This statement illustrates the basic fallacy of the holding of the majority below. Respondent, like the majority below, would do away with the language of the statute requiring that an appellant be "adversely affected by [an] order of the Commission", 47 U. S. C. §402(b)(6), and would abandon

any requirement that the injury giving rise to standing must be the direct and immediate result of the order challenged.

Finally, it should be noted that respondent makes no mention of the *inter*-circuit conflict which is apparent from a comparison of the decision below with *United States Cane Sugar Refiners' Ass'n* v. *McNutt*, 138 F. 2d 116 (2d Cir. 1943), and *Murphy* v. *United States*, 252 F. 2d 389 (7th Cir. 1958), discussed at pages 15 to 17 of the petition. No explanation is given for this curious omission.

Conclusion

The instant petition is this Court's first opportunity to pass on the important questions here presented and to dispel the existing conflict and confusion concerning who has standing to challenge Commission action. Accordingly, this petition should be granted as prayed.

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